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No. 92-1392

In the Supreme Court of the United States

OCTOBER TERM, 1992

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

DANIEL J. SCHOOLCRAFT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Respondents sought disability benefits under Title II and Title XVI of the Social Security Act based on allegations of alcoholism or drug addiction. After respondents were found not to be disabled by the state agency in Minnesota responsible for making initial disability determinations on behalf of the Secretary of Health and Human Services, they brought this putative class action against the Secretary and state officials, claiming that the state agency was not applying the proper standards for evaluating disability claims based on alcoholism or drug addiction. The questions presented are:

1. Whether 42 U.S.C. 1983 provides respondents with a cause of action against state officials based on their allegedly improper administration of the federal disability programs on behalf of the Secretary.

2. Whether the court of appeals properly relied on *Bowen* v. *City of New York*, 476 U.S. 467 (1986), to dispense with the requirement in 42 U.S.C. 405(g) that disability claimants obtain a "final decision of the Secretary" by exhausting administrative remedies before seeking judicial review, when respondents conceded that those remedies would correct the errors of which they complained in individual cases.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Donna E. Shalala, Secretary of Health and Human Services; Walter Roers, Director of the Minnesota Disability Determination Services, and R. Jane Brown, Commissioner of the Minnesota Department of Jobs and Training. Respondents are Daniel J. Schoolcraft, Theodore Thomas, and Joseph Drumbeater.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 971 F.2d 81. The opinion of the district court (App., *infra*, 19a-49a) is reported at 753 F. Supp. 1478.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1992. A petition for rehearing was denied on

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[1] The Attorney General of Minnesota is filing a petition for a writ of certiorari on behalf of the state officials who were defendants in the district court. Those officials will be referred to as the "petitioner state officials."

October 9, 1992. App., *infra*, 50a. On December 29, 1992, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including February 8, 1993. On February 1, 1993, Justice Blackmun further extended the time for filing a certiorari petition to and including February 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. 405(b), 405(g), 405(h), 421, 423(d)(1)(A), 1382c(a)(3)(A), 1383(c)(1) and (3), 1383b(a), and 1983 are set out in the appendix (App., *infra*, 51a-72a).

2. 28 U.S.C. 1331, 1343(a)(3), and 1361 are set out in the appendix (App., *infra*, 73a-75a).

3. 20 C.F.R. 404.1503, 404.1520, 404.1613(a), and Pt. 404, Subpt. P, App. 1, Listing 12.09, are set out in the appendix (App., *infra*, 76a-83a).

STATEMENT

In this putative class action, respondents challenge the manner in which the Minnesota Disability Determination Services, on behalf of the Secretary of Health and Human Services, evaluates claims for disability benefits under Title II and Title XVI of the Social Security Act (Act) based on alleged alcoholism or drug addiction. The district court dismissed the action for lack of subject matter jurisdiction in light of respondents' conceded failure to exhaust administrative remedies, as required by 42 U.S.C. 405(g). The Eighth Circuit reversed. With respect to respondents' claim against the Secretary, the court relied on *Bowen* v. *City of New York*, 476 U.S. 467 (1986), to hold that exhaustion was not required. The Eighth Circuit further held that 42 U.S.C. 1983 provided respondents with a separate cause of action

against state officials. The Secretary seeks review of both holdings.

1. a. Title II of the Act, 42 U.S.C. 401-433 (1988 & Supp. II 1990), establishes a disability insurance program, which provides for the payment of monthly benefits to disabled persons who have contributed to the program. Title XVI of the Act, 42 U.S.C. 1381-1383d (1988 & Supp. II 1990), establishes the Supplemental Security Income (SSI) program, which provides for the payment of monthly benefits to indigent persons who are disabled, blind, or aged. Both titles define "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A); see *Bowen* v. *Yuckert*, 482 U.S. 137, 140 (1987).

The Secretary, acting through the Social Security Administration (SSA), has established a five-step sequential evaluation process for determining whether a person has a "disability" for purposes of Title II and Title XVI. 20 C.F.R. 404.1520, 416.920; see *Yuckert*, 482 U.S. at 140-142; *Sullivan* v. *Zebley*, 493 U.S. 521, 525-526 (1990). At step one, the decisionmaker determines whether the claimant is engaged in substantial gainful activity; if so, benefits are denied. If not, the inquiry proceeds to step two. If the claimant is found at that step not to have a medically severe impairment, benefits are denied. If the claimant does have a severe impairment, the inquiry proceeds to step three.

At step three, the decisionmaker determines whether the claimant's impairment or combination of impairments is the same as, or is equivalent to, any of the listed impairments that the Secretary has specifically determined are so severe as to preclude substantial gainful activity. See *Zebley*, 493 U.S. at 530-531; 20 C.F.R. 404.1526(a), 416.926(a). If the claimant's impairment

does meet or equal a listed impairment, "disability" is conclusively established, and there is no need to proceed to steps four and five. See 20 C.F.R. Pt. 404, subpt. P, App. 1 ("Listing of Impairments"); *Yuckert*, 482 U.S. at 141.

On the other hand, if the claimant's impairment does not meet or equal a listed impairment, the decisionmaker proceeds to steps four and five. At step four, the decisionmaker considers whether the claimant's residual functional capacity (RFC) permits him or her to return to his or her former work; if so, benefits are denied. If not, the decisionmaker determines at step five whether the claimant can perform any other gainful work in the national economy. If so, benefits are denied; if not, benefits are awarded. See 20 C.F.R. 404.1520(a), 416.920(a).

b. In contrast to other programs established under the Act—such as Medicaid (42 U.S.C. 1396 *et seq.*) and Aid to Families with Dependent Children (42 U.S.C. 601 *et seq.*), which are funded jointly by the States and the federal government—the disability programs in Title II and Title XVI are funded exclusively by the federal government. See 42 U.S.C. 401(b), 1381a.[2] Moreover, the Secretary alone is "directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under [the disability programs]." 42 U.S.C. 405(b), 1383(c)(1).

Nonetheless, the States are authorized to make disability determinations in the first instance on behalf of the Secretary. 42 U.S.C. 421(a); see 42 U.S.C. 1383b(a). All 50 States, as well as the District of Columbia and Puerto Rico, have elected to do so. See 46 Fed. Reg. 29,190, 29,199 (1981). The agency in each State designated by the Secretary to make such determinations—usually referred to as the Disability Determination Service (DDS)—must act "in accordance with the pertinent provisions of [the Act] and the standards and criteria contained

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[2] The States may, however, supplement the federal disability benefits payable under Title XVI. 42 U.S.C. 1382e.

in regulations or other written guidelines of the Secretary." 42 U.S.C. 421(a)(2), 1383b(a). In that role, the DDS acts "for the Secretary" and, unless administratively reviewed and modified, a "determination of disability made by the [DDS] is the determination of the Secretary." 20 C.F.R. 404.1613(a), 416.1013(a); 20 C.F.R. 404.1601, 416.1001.

The Secretary has prescribed an "unusually protective" three-stage process of administrative review for any claimant dissatisfied with a DDS's initial disability determination. *Heckler v. Day*, 467 U.S. 104, 106 (1984). First, the claimant may seek *de novo* reconsideration by the DDS. 20 C.F.R. 404.907, 416.1407. If the claimant is dissatisfied with the DDS's decision on reconsideration, he or she is "entitled to a hearing thereon by the Secretary to the same extent as is provided in [42 U.S.C. 405(b)]." 42 U.S.C. 421(d). The hearing is conducted by an administrative law judge (ALJ) within the SSA's Office of Hearings and Appeals. 20 C.F.R. 404.929-404.961, 416.1429-416.1461. An adverse decision by the ALJ may be appealed to the SSA's Appeals Council. 20 C.F.R. 404.967-404.982, 416.1467-416.1482.

A claimant may obtain judicial review in federal district court of a "final decision" or "final determination" of the Secretary, pursuant to 42 U.S.C. 405(g). See 42 U.S.C. 421(d), 1383(c)(3). As this Court has explained, the Secretary's regulations establish that "[o]nly a claimant who proceeds through all three stages [of the administrative appeal process] receives a final decision from the Secretary." *Bowen* v. *City of New York*, 476 U.S. 467, 482 (1986); see also *Heckler* v. *Ringer*, 466 U.S. 602, 606 (1984); *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).[3]

[3] The Secretary has provided by regulation for an expedited administrative appeal process in cases in which the only bar to an award of benefits is a statutory provision that the claimant challenges as unconstitutional. 20 C.F.R. 404.923-404.928, 416.1423-

c. The Secretary is responsible for ensuring uniform administration of the disability programs, both among the DDSs and at each stage of the administrative adjudication of a claim by the DDS and SSA. To ensure uniformity among the DDSs, the Secretary is required to "promulgate regulations specifying * * * performance standards and administrative requirements and procedures to be followed [by the DDSs] in performing the disability determination function." 42 U.S.C. 421(a)(2), 1383b(a). To ensure uniformity throughout the administrative adjudication process, the Secretary must "establish by regulation uniform standards which shall be applied at all levels of determination, review, and adjudication in determining whether individuals are under disabilities." 42 U.S.C. 421(k)(1); see also 42 U.S.C. 421(a)(2). The Secretary also may review individual decisions of a DDS independently of the administrative appeal process that may be invoked by the claimant. Specifically, she may on her own motion review any "determination, made by a State agency under [Title II], that an individual is or is not under a disability"; this review may take place "before or after any action is taken to implement [the DDS's] determination." 42 U.S.C. 421(c)(1). Moreover, the Secretary is required to review a certain percentage of the determinations by DDSs that individuals are disabled before any benefits are paid on the basis of those determinations. 42 U.S.C. 421(c)(2); see 42 U.S.C. 421(c)(3) (Supp. II 1990) (Secretary must review 50% of benefit allowances).

The five-step sequential evaluation process for assessing disability (see pp. 3-4, *supra*) promotes uniformity both among the DDSs and at all stages of the administrative adjudication process. See *Yuckert*, 482 U.S. at 153; *Heckler* v. *Campbell*, 461 U.S. 458, 461 (1983). In

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416.1428; see also *Heckler* v. *Ringer*, 466 U.S. at 606 n.2. That process is not applicable here.

addition, the Secretary has established general performance standards for timeliness and accuracy, which all DDSs are required to meet. See 20 C.F.R. 404.1640-404.1643, 416.1040-416.1043. The Secretary monitors each DDS's compliance with those standards through quality assurance review of the DDS's individual decisions by the Disability Quality Branch (DQB) within SSA's Office of Regional Program and Integrity Reviews, pursuant to 42 U.S.C. 421(c)(1) and (2). DQB's performance, in turn, is subject to quality review by SSA's central office in Baltimore, Maryland. See 20 C.F.R. 404.1660, 416.1060.[4] If the Secretary finds "that a State agency is substantially failing to make disability determinations in a manner consistent with [her] regulations and other written guidelines," she may take over the task of making initial disability determinations. 42 U.S.C. 421(b)(1), 1383b(a).

2. This case concerns the manner in which the Minnesota Disability Determination Services (Minnesota DDS), on behalf of the Secretary, evaluates disability claims based on allegations of alcoholism or drug addiction. Such claims are evaluated under the same five-step sequential evaluation process as are other claims. As relevant here, the Secretary has included "substance addiction disorders" in the listing of impairments that a decisionmaker consults at step three of the sequential evaluation process after determining (at steps one and two) that the claimant is not engaged in substantial gainful activity and has a severe impairment. 20 C.F.R. Pt. 404, subpt. P, App. 1, Listing 12.09. Listing 12.09, first adopted in 1984, begins by defining "substance addiction disorders" as "[b]ehavioral changes or physical changes associated with the regular use of substances that

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[4] SSA's quality assurance review examines a statistically valid random sample of benefit allowances and denials from each DDS. In addition, 50 percent of all findings of disability are subjected to review by SSA before they are given effect by the payment of benefits.

affect the central nervous system." Listing 12.09 then prescribes the level of severity required for the decisionmaker to conclude, without proceeding to steps four and five, that the claimant is disabled. Listing 12.09 provides that that level of severity is met when the requirements of certain other listed mental and physical disorders are met. See generally *In re Petition of Sullivan*, 904 F.2d 826 (3d Cir. 1990).

Recognizing the "complex medical and adjudicative dynamics of alcoholism or drug addiction," the SSA's Office of Disability has addressed substance addiction in its Program Operations Manual System (POMS) and other instructional materials transmitted to state agencies. SSA Program Circ. No. 05-OD-86, at 1 (Apr. 24, 1986) (C.A. App. 45). These materials make clear that "[a]lcoholism or drug addiction can be considered a medically determinable impairment, if it meets the requirements of the Social Security law." *Id.* at 2 (C.A. App. 46). But they stress that "[d]rug addiction and alcoholism are diagnostic terms; they do not denote impairment value or severity." POMS § 24515.045 (Mar. 1986) (C.A. App. 57); see also 20 C.F.R. 404.1525(e) ("a condition diagnosed as addiction to alcohol or drugs * * * will not, by itself, be a basis for determining whether [a claimant] [is], or [is] not, disabled"), 416.925(e) (same). In making a diagnosis, the decisionmaker may take into account "whether the individual has lost the ability to control the use of drugs or alcohol." POMS § 24515.045 (C.A. App. 57. "The loss of ability to control these substances identifies the individual as a drug addict or alcoholic diagnostically, but does not provide a conclusive basis for evaluating the severity of the impairment." *Ibid.* Thus, once a diagnosis of addiction to drugs or alcohol has been made, the claimant's impairment must be evaluated further at step three to determine whether its severity meets or is equivalent to the severity required by Listing 12.09. POMS § 24515.045 (C.A. App. 58); see also POMS § 24515.056 (Oct. 1986) (C.A. App. 59). If not, the decisionmaker proceeds to steps four and five by considering

the claimant's residual functional capacity and resulting ability to engage in gainful work. SSA Program Circ. No. 05-OD-86, *supra*, at 5-6 (C.A. App. 49-50).

3. Respondents are residents of Minnesota who applied for disability benefits under Title II or Title XVI (or both) based on allegations of alcoholism or drug addiction. C.A. App. 96-99; see App., *infra*, 26a-28a. At the time they filed this action, their applications for benefits had been denied by Minnesota DDS. C.A. App. 18-21. None of the respondents, however, had sought a hearing before an ALJ.[5]

a. Respondents filed their complaint in this case on January 25, 1990. C.A. App. 1. They named as defendants the Secretary, the Director of Minnesota DDS, and the Commissioner of Minnesota DDS's parent agency, the Minnesota Department of Jobs and Training. C.A. App. 88, 90 (First Amended and Supplemental Complaint).

Respondents alleged that, in two respects, Minnesota DDS was improperly evaluating claims based on allegations of alcoholism or drug addiction. First, they alleged that Minnesota DDS was ignoring the standard for evaluating such claims established by the Eighth Circuit in *Adams* v. *Weinberger*, 548 F.2d 239 (1977). In respondents' view, *Adams* held that a claimant must be conclusively deemed disabled once it is determined that he or she "is addicted and has lost the ability to voluntarily control the use of alcohol/drugs." C.A. App. 95. Second,

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[5] Specifically, respondent Schoolcraft's claim for Title II and Title XVI benefits had been denied by Minnesota DDS at the initial stage, and he had requested reconsideration. C.A. App. 18. Respondent Thomas's claims for Title II and Title XVI benefits had been denied by Minnesota DDS at the initial and reconsideration stages. *Id.* at 19-20. Respondent Drumbeater's claim for Title XVI benefits had likewise been denied at the initial and reconsideration stages. *Id.* at 20-21. Subsequently, all three plaintiffs were awarded benefits—Schoolcraft and Drumbeater in May 1990, and Thomas in February 1991. App., *infra*, 3a n.3.

respondents alleged that Minnesota DDS was not gathering adequate medical evidence to rule on disability claims based on substance addiction. *Ibid.*

Significantly, respondents did not contend that the errors allegedly made by Minnesota DDS were also being made by SSA at subsequent stages of the administrative adjudication process. On the contrary, they asserted that "[a]t the Hearing stage, Administrative Law Judges routinely and consistently overturn [Minnesota DDS's] earlier decisions." C.A. App. 96. Respondents sought to represent a class of disability claimants who had not received a decision, either favorable or unfavorable, from an ALJ, C.A. App. 91, and who therefore had not exhausted their administrative remedies. App., *infra*, 25a.

b. On January 3, 1991, the district court granted summary judgment in favor of the Secretary and the petitioner state officials, concluding that it lacked subject matter jurisdiction over this action. App., *infra*, 19a-49a. In light of that conclusion, the court denied respondents' motion for class certification as moot. *Id.* at 48a.

The court first held that it did not have jurisdiction under 42 U.S.C. 405(g) because respondents had failed to exhaust their administrative remedies. App., *infra*, 29a-45a. In so holding, the court rejected respondents' contention that this case involved "unique circumstances" (*id.* at 45a) of the sort that under *Bowen* v. *City of New York*, 476 U.S. 467 (1986), would excuse a claimant's failure to satisfy Section 405(g)'s exhaustion requirement. The district court observed that, in contrast to *City of New York*, this case did not involve a secret, internal policy that conflicted with the Act or the Secretary's regulations. App., *infra*, 34a-39a. Rather, respondents "essentially argue that *Adams* establishes a per se disability test, that is, the disability inquiry should end at step three of the evaluation process on the mere diagnosis of alcoholism." App., *infra*, 35a. That interpretation of *Adams*, the district court concluded, "contradicts con-

gressional intent to limit disability benefits under the Social Security Act to only those persons who are unable to perform substantial gainful activity." *Id.* at 36a.

The district court distinguished this case from *City of New York* on other grounds as well. First, it determined that the issues raised by respondents' lawsuit are not "entirely collateral" to their claim for benefits. App., *infra*, 41a. Instead, by contending "that persons who lack the ability to voluntarily control their drinking are, on the basis of *Adams*, entitled to a presumption of disability in step three of the evaluation process without reference to the listings under § 12.09," respondents were, in the court's view, challenging "the Secretary's substantive standards governing the entitlement to benefits," and thus presenting a claim "inextricably intertwined" with their claims for benefits. App., *infra*, 40a (citing *Heckler* v. *Ringer*, 466 U.S. at 614). Second, the court found that respondents had failed to demonstrate irreparable harm, observing that "[u]nlike the class members in *City of New York*, the members of the proposed class in the present case are no different [from] any other claimant who has been denied benefits at the initial stages of the administrative process." App., *infra*, 42a. Finally, the court determined that "the policies which support the exhaustion requirement would be served if [respondents] were required to proceed to the third and fourth levels of the administrative process" (*id.* at 45a), because "[i]n sharp contrast to *City of New York*, the plaintiffs in the present case openly concede that exhaustion will remove the alleged errors in the administrative process" (*id.* at 43a).

The court further held that it did not have mandamus jurisdiction, because 42 U.S.C. 405(g) "clearly provides [respondents] with an adequate remedy for challenging all aspects of the Secretary's denial of their claims." App., *infra*, 46a. It similarly held that federal-question jurisdiction under 28 U.S.C. 1331 was foreclosed by 42

U.S.C. 405(h). App., *infra*, 46a-48a (citing *Salfi*, 422 U.S. at 756-757).

4. The Eighth Circuit reversed and remanded the case to the district court for further proceedings. App., *infra*, 1a-18a.[6]

It first held that "the district court erred in failing to waive the exhaustion requirement of section 405(g)." App., *infra*, 14a. In the court of appeals' view, respondents had "established the[] prerequisites to waiver" under *City of New York*. App., *infra*, 9a. Although the court of appeals recognized that respondents' "present contentions may be intertwined with their claims for benefits," it deemed those contentions "sufficiently collateral" to justify a "waiver" of exhaustion, *id.* at 10a, because rather than seeking an award of benefits, respondents sought an order requiring the Secretary to "apply the same standards to [respondents'] claims for benefits at each stage of the administrative process," *id.* at 5a; see also *id.* at 10a. Next, citing affidavits in which putative class members alleged that without disability benefits they would experience economic hardship, the Eighth Circuit determined that respondents had made a "sufficient showing of irreparable harm." *Id.* at 11a. But the court considered respondents' "most telling and forceful argument" to be that "unless exhaustion is waived, if the *ALJ* implements the correct procedures and applies the correct standards and, where appropriate, awards benefits, there will never be judicial review to challenge the actions the DDS takes at the initial and reconsideration stages." *Id.* at 14a. Thus, the court concluded that ex-

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[6] As an initial matter, the court of appeals held that the award of disability benefits to the individual respondents after they filed this action (see note 5, *supra*) did not render the case moot. App., *infra*, 3a n.3 (citing, *inter alia*, *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980)). We do not seek review of that holding.

haustion was "futile" because it would correct the alleged errors of which respondents complain. *Ibid.*[7]

The Eighth Circuit further held that respondents had stated a claim against the petitioner state officials under 42 U.S.C. 1983, over which the district court could assert federal-question jurisdiction under 28 U.S.C. 1331. App., *infra*, 15a-17a.[8] The Eighth Circuit did not cite any support for that holding, and it expressly "disagree[d] with the holding of the Second Circuit" to the contrary in *Ellis* v. *Blum*, 643 F.2d 68 (1981). App., *infra*, 17a n.14.[9]

5. The Eighth Circuit, with three judges dissenting, denied suggestions of rehearing en banc filed by the Secretary and the petitioner state officials. App., *infra*, 50a.

REASONS FOR GRANTING THE PETITION

The court of appeals plainly erred in holding that state officials may be sued under 42 U.S.C. 1983 for their allegedly improper administration of the disability programs established by Title II and Title XVI of the Social Security Act. State disability determinations are made

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[7] In light of its holding that relief was available against the Secretary under Section 405(g), the court of appeals found it unnecessary to decide whether relief was also available under the mandamus statute, 28 U.S.C. 1361. App., *infra*, 15a. It "note[d]," however, that "this court and other courts have found an alternative basis for jurisdiction under section 1361 in similar circumstances"; based on that view, it vacated the district court's dismissal of respondents' mandamus claim. App., *infra*, 15a.

[8] The court of appeals rejected respondents' reliance on 28 U.S.C. 1343(a)(3) as a basis for jurisdiction over their claims against the petitioner state officials. App., *infra*, 15a (citing *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 621 (1979)).

[9] The court of appeals stated that respondents had "not expressly allege[d] a violation under 42 U.S.C. § 1983." App., *infra*, 16a. In fact, respondents did cite Section 1983 in their amended complaint. C.A. App. 100.

on behalf of the Secretary as part of a unitary administrative adjudication process that culminates in review by the Appeals Council that the Secretary has established in the Social Security Administration. As a result, the Secretary is the real party in interest in any suit involving the administration of the disability programs, and any such suit must be brought against the Secretary in accordance with 42 U.S.C. 405(g). The contrary holding below, as the Eighth Circuit acknowledged, squarely conflicts with a decision of the Second Circuit. This Court should resolve that circuit conflict, in light of the potentially devastating impact that separate lawsuits against state officials could have on the "orderly administrative mechanism" for evaluating disability claims established by Titles II and XVI and their regulations. *Califano* v. *Sanders*, 430 U.S. 99, 102 (1977).

Nor may Social Security claimants accomplish the same result indirectly by challenging the actions of state agency officials in a suit brought against the Secretary under 42 U.S.C. 405(g) immediately after receiving an adverse disability determination from the state agency. In order to invoke Section 405(g), a claimant must comply with its requirement that he or she first exhaust available administrative remedies by seeking an ALJ hearing and Appeals Council review in the SSA, and thereby obtain the "final decision of the Secretary" on his or her claim for benefits. If the exhaustion rule is not strictly enforced, suits under Section 405(g) will have exactly the same adverse impact on the orderly administration of the disability programs as suits directly against state officials under 42 U.S.C. 1983. For that reason, the Court should also review the Eighth Circuit's holding that under *Bowen* v. *City of New York*, 476 U.S. 467 (1986), respondents were excused from satisfying the exhaustion requirement before seeking judicial review under 42 U.S.C. 405(g). *City of New York* should not be read to dispense with that requirement where, as here, exhaustion would remedy

the alleged errors for which judicial review is sought, and the only supposedly "irreparable injury" the claimants assert is the same denial of benefits during the administrative review process that any of the millions of Social Security claimants could invoke as a basis for immediate judicial review.

1. The Eighth Circuit erred in holding that 42 U.S.C. 1983 provides respondents with a cause of action against the petitioner state officials. That holding, moreover, squarely conflicts with the Second Circuit's decision in *Ellis* v. *Blum*, *supra*. The question whether state officials may be sued under Section 1983 for their allegedly improper administration of the federal disability programs is of great importance to both the federal government and the States. Further review is therefore warranted.

a. State officials do not act "under color of state law" within the meaning of 42 U.S.C. 1983 when they make disability determinations on behalf of the Secretary. Rather, they act under color of federal law, as the Second Circuit held in *Ellis* v. *Blum*, *supra*. Because the "under color of state law" requirement is "a jurisdictional requisite for a § 1983 action,". *West* v. *Atkins*, 487 U.S. 42, 46 (1988), respondents' Section 1983 claims against the petitioner state officials should have been dismissed.

The responsibility for deciding disability claims under Title II and Title XVI rests solely with the Secretary. Under each title, the Secretary is "directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this [title]." 42 U.S.C. 405(b), 1383(c)(1). Moreover, the Secretary's approval of the state agency's decision is required prior to the payment of disability benefits. Under Title II, a claimant's right to benefits arises only "[u]pon final decision of the Secretary, or upon final judgment of any court of competent jurisdiction, that [the claimant] is entitled to any payment or payments," and payment must be made "in accordance with the certification of the Secre-

tary." 42 U.S.C. 405(i). Similarly, it is the Secretary who is specifically designated to pay benefits under Title XVI. 42 U.S.C. 1381a.

When a state DDS makes disability determinations under Title II and Title XVI, it is "acting under the authority and supervision of the Secretary." *Yuckert*, 482 U.S. at 142. It must apply the five-step sequential evaluation process developed by the Secretary for evaluating disability claims. See 42 U.S.C. 421(k)(1), 1383(d). It must also satisfy the "performance standards and administrative requirements and procedures" that the Secretary has developed "to assure effective and uniform administration" of the disability programs. 42 U.S.C. 421(a)(2); see 42 U.S.C. 1383b(a). In return for those services, each State is "entitled to receive * * * the cost to the State of making disability determinations." 42 U.S.C. 421(e), 1383b(a). The role of the States under Title II and Title XVI thus is limited to determining one aspect of eligibility for federal funds under federal criteria, in exchange for federal reimbursement.

In *Ellis* v. *Blum*, the Second Circuit relied upon the pervasively federal nature of the Title II disability program when it affirmed the dismissal of a Section 1983 claim against state officials based on their allegedly improper administration of the program. 643 F.2d at 83-84. The court held that "[Section] 1983 is unavailable" because "the state officials were not acting under color of state law." *Id.* at 83. The court explained that "the state agencies function solely as agents of the Secretary in making determinations of disability, applying federal law and federal regulations in accordance with procedures prescribed by her." *Id.* at 83 n.17; accord *Lynn* v. *United States Dep't of Health & Human Servs.*, 583 F. Supp. 532, 533 (S.D.N.Y. 1984); see also *Chilicky* v. *Schweiker*, 796 F.2d 1131, 1135 n.3 (9th Cir. 1986), rev'd on other grounds, 487 U.S. 412 (1988); cf. *Rosas* v. *Brock*, 826 F.2d 1004, 1007 (11th Cir. 1987) (Section 1983 action

did not lie against state officials based on their administration of federal Disaster Relief Act).

Here, the Eighth Circuit expressly "disagree[d] with the holding of the Second Circuit that the state defendants are acting solely as agents of the United States." App., *infra*, 17a n.14. The Eighth Circuit cited no legal support for its holding, however, and that holding cannot be reconciled with the comprehensively federal nature of Title II and Title XVI.

b. The acknowledged conflict between the decision below and *Ellis* v. *Blum* warrants review by this Court. The Eighth Circuit's decision could disrupt the administration of the disability programs in two ways. First, by exposing state officials to lawsuits, it could discourage States from participating in the administration of the programs. Cf. 20 C.F.R. 404.1615(g), 416.1015(g) (DDSs are not "responsible for defending in court any determination made, or any procedure for making determinations").[10] A State's decision to withdraw from the programs would cause economic dislocation within the State, see 42 U.S.C. 421(b)(3)(B) (labor-protection measures applicable when Secretary determines that state agency should discontinue disability determination function), and impose a daunting new administrative burden on the "already overburdened" SSA. *Heckler* v. *Campbell*, 461 U.S. at 468.

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[10] There are at least four other pending cases involving the administration of the federal disability programs in which state officials, as well as the Secretary, have been named as defendants. *Day* v. *Sullivan*, 794 F. Supp. 801 (S.D. Ohio 1992), appeal pending, No. 92-3963 (6th Cir.); *Bentley* v. *Phillips*, No. 92-40-CIV-J-14 (M.D. Fla.); *Goodnight* v. *Sullivan*, No. 90-0460-CV-W-5 (W.D. Mo.); *Cuffee* v. *Sullivan*, No. 90-0460 (W.D. Mo.); see also *Titus* v. *Sullivan*, 776 F. Supp. 477 (S.D. Iowa 1991), appeal pending, No. 91-3498 (8th Cir.). The risk of future lawsuits against state officials is enhanced by the liberal standard in 42 U.S.C. 1988 for awarding attorney's fees to plaintiffs in Section 1983 cases. See *Maine* v. *Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting); cf. *Smith* v. *Robinson*, 468 U.S. 992, 1020-1021 (1984).

Second, the Eighth Circuit's decision would frustrate "Congress' oft-repeated goal of uniform administration of the Act." *Day*, 467 U.S. at 116. Congress intended to achieve uniform administration by requiring the Secretary to oversee the States' performance. The Eighth Circuit's decision, however, disperses oversight responsibility among the lower courts and invites peremptory and disruptive judicial intervention in the Secretary's ongoing review of individual claims.

c. Even if the petitioner state officials were deemed to be acting "under color of state law," they would not be subject to suit under Section 1983. That is because Titles II and XVI establish "a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498, 521 (1990) (quoting *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)).

This Court "found a remedial scheme established by Congress sufficient to displace the remedy provided in § 1983" (*Wilder*, 496 U.S. at 521) in *Smith* v. *Robinson*, 468 U.S. 992 (1984). In *Smith*, the Court held that the Education of the Handicapped Act (EHA) (20 U.S.C. 1400 *et seq.*) furnished the "exclusive avenue" through which an individual may assert a right to a free appropriate public education. 468 U.S. at 1009. That holding was based on "the comprehensive nature of the procedures and guarantees set out in the EHA," which includes "detailed procedural safeguards, and a right to judicial review." *Id.* at 1011. The plaintiffs in *Smith* were precluded from "circumvent[ing] * * * Congress' carefully tailored scheme" by bringing an action under Section 1983 alleging violations of the EHA and the Equal Protection Clause. *Id.* at 1012.

Like the EHA, Title II and Title XVI of the Social Security Act establish a remedial scheme that is "sufficiently comprehensive" to demonstrate Congress's intent

to displace relief under Section 1983. The DDS makes initial disability determinations under regulations, guidelines, and performance standards established by the Secretary. 42 U.S.C. 421(a)(2), 1383b(a). In addition, the Secretary conducts case-by-case review of a significant portion of the DDSs' determinations pursuant to the quality review process required under Title II. See pp. 6-7 & n.4, *supra*; 42 U.S.C. 421(c)(2) and (3) (Supp. II 1990). If the Secretary determines that a State has substantially failed to comply with the regulations and other guidelines for making disability determinations, she may take over the task of making those determinations. 42 U.S.C. 421(b)(1). Case-by-case review of DDS decisions also occurs at the instance of individual claimants who are dissatisfied with DDS decisions and seek review by an ALJ or the Appeals Council in SSA. 42 U.S.C. 421(d), 1383(c)(1); see also *Day*, 467 U.S. at 106 (administrative review scheme is "unusually protective" of claimants' interests). Claimants who are dissatisfied with the final decision of the Secretary may then obtain judicial review in the manner specifically provided for in Title II and Title XVI. 42 U.S.C. 421(d), 1383(c)(3). In short, Congress "has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were." *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988); see also *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1368-1369 (1992); *Carelli* v. *Howser*, 923 F.2d 1208, 1212-1217 (6th Cir. 1991).[11]

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[11] As was true in *Chilicky*, 487 U.S. at 425-426, congressional attention to the problem at issue here has been continuing. Congress has repeatedly addressed the Secretary's authority to monitor the States' performance of the disability determination function. See *Day*, 467 U.S. at 116-118 (discussing 1980 amendments to 42 U.S.C. 421); Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 17, 98 Stat. 1811-1812; see also 56 Fed. Reg. 11,012, 11,025 (1991) (publishing final rules empowering Secretary to ensure compliance by state agencies with federal standards). Congress amended Section 421 most recently in 1990

In any event, judicial relief outside of 42 U.S.C. 405(g) —in a suit under Section 1983—is precluded by Section 405(h).[12] Both the second and third sentences of Section 405(h) bar jurisdiction over respondents' Section 1983 claim against the petitioner state officials. The second sentence precludes judicial review of any "findings of fact or decision of the Secretary" except under Section 405(g). That sentence applies to disability determinations by state agencies because, unless reviewed or modified by the Secretary, a "determination of disability made by the [state DDS] is the determination of the Secretary." 20 C.F.R. 404.1613(a), 416.1013(a); see also 20 C.F.R. 404.1601, 416.1001. The third sentence of Sec-

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to require the Secretary to review a specified percentage of state determinations awarding disability benefits. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Tit. V, § 5128(a), 104 Stat. 1388-286 to 1388-287 (codified at 42 U.S.C. 421(c)(3) (Supp. II 1990)). This history of legislative oversight further evidences Congress's intention to preclude Section 1983 relief. Cf. *Wilder*, 496 U.S. at 515-518, 522 (legislative history of Boren Amendment weighed against preclusion of Section 1983 relief, because it demonstrated Congress's intention to limit Secretary's role in setting Medicaid reimbursement rates).

[12] 42 U.S.C. 405(h) provides:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

As part of Title II, Section 405(h) applies directly to decisions by the Secretary under Title II; Section 405(h) also applies to decisions by the Secretary under Title XVI, since those decisions are subject to judicial review "to the same extent as the Secretary's final determinations under section 405" (42 U.S.C. 1383 (c)(3)). See *Smith* v. *Schweiker*, 709 F.2d 777, 779 (2d Cir. 1983) (exclusion of judicial review in Section 405(h) "has been implicitly incorporated into Title XVI" by 42 U.S.C. 1383(c)(3)); accord *Jones* v. *Califano*, 576 F.2d 12, 17 (2d Cir. 1978).

tion 405(h) bars any "action against the United States, the Secretary, or any officer or employee thereof." It bars claims against state officials where (as here) jurisdiction is claimed to rest on 28 U.S.C. 1331, because, as discussed above, those officials act on behalf of the Secretary and therefore stand in the shoes of her officers or employees for present purposes. See *Ellis* v. *Blum*, 643 F.2d at 76.[13]

2. a. The Eighth Circuit also seriously erred by relying on *Bowen* v. *City of New York* to dispense with the exhaustion requirement of 42 U.S.C. 405(g), which permits judicial review only of the Secretary's "final decision" on a claim for benefits. The Eighth Circuit reasoned that, if respondents were required to seek administrative review of Minnesota DDS's determinations, the alleged errors by Minnesota DDS upon which this action was based would be corrected by ALJs and therefore would evade judicial review. App., *infra*, 14a. It was on that basis that the Eighth Circuit concluded that exhaustion would be "futile." *Ibid.* That rationale stands the exhaustion doctrine on its head.

A central purpose of the exhaustion requirement is to afford the agency an opportunity to correct its own errors. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); see also *City of New York*, 476 U.S. at 484-485. Respondents asserted that the errors allegedly made by Minnesota DDS were being corrected by ALJs. C.A. App. 96 ("At the Hearing stage, Administrative Law Judges routinely and consistently overturn [Minnesota DDS's] earlier deci-

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[13] Like the plaintiffs in *Smith* v. *Robinson*, respondents have asserted constitutional claims that are "virtually identical to" their statutory claims. See 468 U.S. at 1009. Under *Smith*, it is clear that neither the constitutional nor statutory claims may be asserted in a Section 1983 action against state officials. Rather, both types of claims must be channeled first through the administrative review process established in Title II and Title XVI, after which respondents may seek review of any remaining claims in an action challenging the "final decision" of the Secretary. 42 U.S.C. 421(d); see 42 U.S.C. 1383(c)(1) and (3); see also *Heckler* v. *Ringer*, 466 U.S. at 614.

sions."); Resp. C.A. Br. 5 ("If a claimant exhausts his administrative remedies, his claim will be considered by an ALJ using the proper standards."). Accepting that assertion, if respondents had exhausted their administrative remedies, the Secretary would have had an opportunity to correct her (*i.e.*, Minnesota DDS's) alleged errors; in fact, the three named respondents were awarded benefits when they sought review by SSA.[14] A remedy is in no sense "futile" when it affords the very relief that the claimant seeks. Exhaustion therefore was mandatory not only because of the statutory requirement that the claimant receive the "final decision of the Secretary" (42 U.S.C. 405(g)), but also because exhaustion would have fulfilled the central purpose of that requirement.

City of New York does not support the Eighth Circuit's contrary conclusion. In *City of New York*, the district court found "overwhelming" evidence of a "fixed clandestine policy" adopted by SSA that "was inconsistent in critically important ways with established regulations." 476 U.S. at 475, 485. That policy was enforced through internal memoranda and the "returns" process by which SSA sent individual cases back to the States for correction. *Id.* at 474-475 & n.5. Under the challenged policy, DDS examiners presumed at step three of the sequential evaluation process that claimants whose im-

[14] In the district court, the Secretary disputed respondents' contention that the standards applied by Minnesota DDS in assessing disability claims based on allegations of alcoholism or drug addiction are different from the standards applied by ALJs and the Appeals Council. In particular, the Secretary challenged respondents' assertion that at step three of the sequential evaluation process the ALJs and the Appeals Council rely on *Adams* to presume conclusively that a claimant is disabled if he or she "is addicted and has lost the ability to voluntarily control the use of alcohol/drugs." C.A. App. 95. The district court rejected respondents' understanding of *Adams*, finding that it "contradict[ed] congressional intent to limit disability benefits under the Social Security Act to only those persons who are unable to perform substantial gainful activity." App., *infra*, 36a.

pairments did not meet or equal a listed impairment had the residual functional capacity (RFC) to do at least unskilled work. *Id.* at 475. "[T]hese tainted RFC assessments by state review physicians were subsequently given great weight by ALJ's in the administrative appeal process." *Ibid.* (internal quotation marks omitted). Under these "unique circumstances," this Court held that exhaustion was "futile." *Id.* at 485.

This case does not involve any of the circumstances that led the Court in *City of New York* to conclude that exhaustion was futile. Respondents do not allege that the Secretary is applying an illegal policy in evaluating disability claims; on the contrary, they state that the "proper standards" are being applied by ALJs. Nor do respondents allege that the DDS's allegedly improper evaluation of claims was the result of clandestine pressure from SSA, as was alleged in *City of New York*, 476 U.S. at 473-474. Instead, respondents argue that DDS officials are failing to adhere to the Eighth Circuit's decision in *Adams*, and that the Secretary has failed to correct that alleged error on a system-wide basis. And in contrast to *City of New York*, where the district court found "overwhelming" evidence to support the plaintiffs' charge, the district court here rejected respondents' *Adams*-based argument, App., *infra*, 35a-39a.[15] Finally, respondents do not assert that the DDS's evaluations of disability claims are given "great weight" by ALJs or otherwise influence

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[15] The plaintiffs in *City of New York* contended, and the district court held, that at step three of the sequential evaluation process the Secretary improperly presumed that certain claimants were able to work, and that that presumption precluded an individualized assessment of those claimants' actual ability to work. Respondents' contention is quite different. Respondents contend that at step three the Secretary should have applied a presumption with respect to certain claimants and that it was improper for her to make individualized determinations of those claimants' actual ability to work. The district court rejected those contentions. App., *infra*, 35a-39a.

subsequent administrative review, cf. *City of New York*, 476 U.S. at 475; they make the contrary assertion. In sum, this case does not involve a "fixed clandestine policy" (*City of New York*, 476 U.S. at 475) that "was applied throughout the elaborate administrative process" (*City of New York* v. *Heckler*, 742 F.2d 729, 733 (2d Cir. 1984), aff'd, 476 U.S. 467 (1986)) so as to reduce that process to a "paper charade" (*City of New York* v. *Heckler*, 578 F. Supp. 1109, 1124 (E.D.N.Y.), aff'd, 742 F.2d 729 (2d Cir. 1984), aff'd, 476 U.S. 467 (1986)). The Eighth Circuit's reliance on *City of New York* was therefore misplaced.[16]

City of New York is inapposite for another reason. In *City of New York*, the district court found that the plaintiffs could suffer irreparable injury in the form of a "severe medical setback" if they were required to go through the administrative appeal process. 476 U.S. at 483 (quoting 578 F. Supp. at 1118). That finding was based in part on evidence that "[m]any persons ha[d] been hospitalized due to the trauma of having disability benefits cut off." 476 U.S. at 484 (quoting 578 F. Supp. at 1118). No comparable evidence was presented here, and the district court made no comparable finding of irreparable injury. On the contrary, the district court

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[16] The Eighth Circuit expressed concern that the allegedly systemic nature of DDS's errors would not be addressed by administrative review of individual DDS determinations. That concern did not justify dispensing with the exhaustion requirement on a systemic basis. System-wide errors by a DDS are to be identified and resolved through the quality assurance process. See pp. 6-7 & n.4, *supra*. That process was found to have broken down in *City of New York*, 578 F. Supp. at 1115-1116, 1118, but not here. Compare *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 891 (1990) ("respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made").

found that respondents and the putative class members were "no different [from] any other claimant who has been denied benefits at the initial stages of the administrative process." App., *infra*, 42a. Although the Eighth Circuit reversed that determination (App., *infra*, 11a-12a & n.10), the affidavits upon which it relied do not allege "severe medical setback[s]" of the sort found in *City of New York*, 476 U.S. at 483. Instead, the affidavits allege only economic hardship resulting from the failure to receive benefits during pursuit of administrative appeals—an allegation that any of the millions of Social Security claimants each year might make, and that Congress therefore could not have intended to be a basis for avoiding the statutory requirement that a claimant receive the "final decision" of the Secretary before seeking judicial review under 42 U.S.C. 405(g). Cf. *Schweiker* v. *Chilicky*, 487 U.S. 412, 428-429 (1988).[17]

Finally, the Eighth Circuit erred in holding that respondents' contentions were "sufficiently collateral" to their claims for benefits to dispense with Section 405(g)'s exhaustion requirement in this case. The Eighth Circuit attached great significance to the fact that, rather than seeking benefits, respondents challenged the Secretary's "failure to ensure that uniform standards are applied at all levels of review." App., *infra*, 10a; see also *id.* at 5a.

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[17] Where Congress has concluded that possible economic hardship during exhaustion of the administrative review process warrants special consideration, it has addressed that problem directly. See 42 U.S.C. 423(g) (providing for continued payment of benefits on an interim basis, until the ALJ renders a decision, following a state agency's determination that a person already receiving disability benefits is not disabled). Congress's omission of any comparable relief in other circumstances (*e.g.*, where a person applying for benefits in the first instance is found by the state agency not to be disabled) cuts strongly against a judicial determination that mere delay in receiving benefits pending exhaustion of administrative remedies is the sort of "irreparable injury" that would excuse the claimants from complying with the statutory exhaustion requirement.

The district court, however, properly concluded that respondents were actually challenging the substantive standards applied at all levels for evaluating disability claims based on alcoholism and drug addiction. App., *infra*, 40a. Such a challenge is not "collateral" to a claim for benefits merely because it does not depend on the facts of each case. See *Ringer*, 466 U.S. at 620. Rather, the standard for determining whether a claim is "collateral" for purposes of dispensing with Section 405(g)'s exhaustion requirement should—absent truly unique or extraordinary circumstances—approximate the stringent standard developed for the "collateral order" doctrine of appellate review enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Eldridge*, 424 U.S. at 330-331 & n.11 (noting that constitutional claim was "entirely collateral" to claim for benefits, citing *Cohen*); *Tataranowicz* v. *Sullivan*, 959 F.2d 268, 274 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 963 (1993); see also *Abbey* v. *Sullivan*, 978 F.2d 37, 46 (2d Cir. 1992); see generally *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687-688 (1993). Respondents clearly have not shown that the issues they raise satisfy that standard, and they have identified no unique or extraordinary circumstances that could excuse them from doing so.[18]

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[18] Although the Court observed in *City of New York* that the claims there were "collateral" to the class members' claims for benefits, 476 U.S. at 483, the Court ultimately rested its decision on the amalgam of "unique circumstances" in that case, *id.* at 485, which is not remotely replicated here. Furthermore, even if the sort of issues respondents raise in this case were regarded as sufficiently collateral to a claim for benefits to warrant immediate judicial review of those issues, that would not excuse the claimant who seeks review on those issues from keeping his or her underlying claim for benefits alive by seeking further review of an administrative denial of that claim within the 60-day period allowed at each stage of administrative or judicial review—just as a party who seeks appellate review under 28 U.S.C. 1291 of a truly collateral issue is not excused from complying with procedural requirements

b. The Eighth Circuit is not alone among the courts of appeals in relying on *City of New York* to create sweeping exceptions to Section 405(g)'s exhaustion requirement. Other circuits have read *City of New York* overbroadly to dispense with exhaustion in massive class actions challenging the Secretary's administration of the Social Security Act in a wide array of settings.[19] Those decisions, like the decision below, ignore this Court's admonition in *City of New York* that "exhaustion is the rule in the vast majority of cases," 476 U.S. at 486, and that exhaustion was excused there because of the "unique circumstances" presented, *id.* at 485. In fact, judicial dispensation of claimants' failure to comply with the exhaustion requirement has become routine in class actions involving thousands—and even scores of thousands—of claimants.[20]

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for presenting or defending the case on the merits in the district court while the appeal on the collateral issue is pending. Thus, even if exhaustion could properly be excused in a case such as this, the class should include only those claimants whose substantive claims for benefits have remained alive during the pendency of the suit raising the supposedly "collateral" issue.

[19] See *Tataranowicz* v. *Sullivan*, 959 F.2d 268, 273-275 (D.C. Cir. 1992) (class action challenging Secretary's interpretation of Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979), cert. denied, 113 S. Ct. 963 (1993); *Marcus* v. *Sullivan*, 926 F.2d 604, 612-615 (7th Cir. 1991) (class action challenging Secretary's methodology for evaluating claims by spouses seeking disability benefits under Title II and Title XVI); *Johnson* v. *Sullivan*, 922 F.2d 346, 352-355 (7th Cir. 1990) (en banc) (class action challenging Secretary's evaluation of disability claims); *Briggs* v. *Sullivan*, 886 F.2d 1132, 1138-1141 (9th Cir. 1989) (same); *Bailey* v. *Sullivan*, 885 F.2d 52, 63-66 (3d Cir. 1989) (same); *Wilkerson* v. *Bowen*, 828 F.2d 117, 121-122 (3d Cir. 1987) (same); *Hyatt* v. *Heckler*, 807 F.2d 376, 378-380 (4th Cir. 1986) (same), cert. denied, 484 U.S. 820 (1987).

[20] For example, the Department of Health and Human Services advises us that the plaintiff class in *Day* v. *Sullivan*, 794 F. Supp. 801 (S.D. Ohio 1992), appeal pending, No. 92-3963 (6th Cir.), consists of approximately 320,000 claimants.

This case presents an appropriate opportunity for the Court to clarify the circumstances under which Section 405(g)'s exhaustion requirement may be dispensed with in class actions challenging the Secretary's administration of Social Security Act programs. Cf. *Heckler* v. *Ringer*, 466 U.S. at 605 (certiorari was granted to "sort out the thorny jurisdictional problems" raised by putative class action challenging Secretary's policy that surgical procedure was not reimbursable under Medicare Act). This case is an especially suitable vehicle for that purpose, since it also presents the closely related issue of whether Social Security claimants may circumvent the exhaustion requirement of 42 U.S.C. 405(g) by bringing an action under 42 U.S.C. 1983 against the state officials who make disability determinations on behalf of the Secretary.

3. The social security system "is of unprecedented dimension." *Califano* v. *Boles*, 443 U.S. 282, 283 (1979). In particular, "[t]he disability programs administered under Titles II and XVI 'are of a size and extent difficult to comprehend.'" *Day*, 467 U.S. at 106 (quoting *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971)). In fiscal year 1992, more than 3.1 million disability claims were filed under the two titles, and more than $44.7 billion in disability benefits were paid out. The Eighth Circuit's decision in this case and other decisions like it severely disrupt the administration of the massive disability programs by allowing claimants to bypass the comprehensive scheme for administrative review—and, now, to sue state officials directly. Review by this Court therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 91-1643

DANIEL J. SCHOOLCRAFT; THEODORE THOMAS, and JOSEPH DRUMBEATER, individually and on behalf of all others similarly situated, APPELLANTS

v.

LOUIS W. SULLIVAN, M.D., Secretary of Department of Health and Human Services; WALTER ROERS, in his official capacity as Director of the Disability Determination Services; R. JANE BROWN, in her official capacity as Commissioner of the Minnesota Department of Jobs and Training, APPELLEES

Submitted Nov. 13, 1991

Decided July 2, 1992

Rehearing and Rehearing En Banc
Denied Oct. 9, 1992

Before LAY,* Chief Judge, ARNOLD,** Circuit Judge, and STUART,*** Senior District Judge.

LAY, Chief Judge.

This is an appeal from the district court's [1] award of summary judgment dismissing a class action [2] complaint filed by three individuals, Daniel J. Schoolcraft, Theodore Thomas and Joseph Drumbeater, against Louis W. Sullivan, Secretary of the Department of Health and Human Services (Secretary), and Walter Roers and R. Jane Brown in their official capacities as Director of Minnesota's Disability Determination Services and Commissioner of the Minnesota Department of Jobs and Training, respectively. Plaintiffs challenged the procedures and standards applied by defendants to disability claims involving chronic alcoholism or some other drug dependency. *See Schoolcraft v. Sullivan*, 753 F.Supp. 1478 (D.Minn.1991). At the time the class action was filed, January 25,

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* The HONORABLE DONALD P. LAY was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

** The HONORABLE RICHARD S. ARNOLD became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

*** The HONORABLE WILLIAM C. STUART, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

[2] The class allegedly consists of over 4000 plaintiffs, each of whom sought benefits based on disability due to chronic alcoholism.

1990, each of the plaintiffs had applied for disability benefits by reason of chronic alcoholism. The district court awarded summary judgment to the defendants and dismissed the complaint for lack of subject matter jurisdiction based upon the plaintiffs' failure to exhaust their administrative remedies. Consequently, the court concluded that plaintiffs' motion for class certification was moot. Jurisdiction was alleged under 42 U.S.C. § 405(g) (1988), 28 U.S.C. §§ 1331, 1343(3) and 1361 (1988).[3]

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[3] Subsequent to the filing of the class action, Schoolcraft and Drumbeater were awarded disability benefits in May 1990 and Thomas received benefits in February 1991. The defendants allege that this moots the law suit. We must respectfully disagree. The district court denied certification of the class as moot on the basis that it lacked jurisdiction to entertain the complaint. This court finds that jurisdiction to hear the case does lie with the federal courts. Plaintiffs' motion for class certification is not moot as it was not decided upon the merits. Notwithstanding the grant of eligibility, these plaintiffs continue to have a personal stake in the litigation because their continuing eligibility is subject to periodic review. *United States Parole Comm. v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); *Wilkerson v. Bowen*, 828 F.2d 117 (3d Cir. 1987). Since the class action was denied *before* the named plaintiffs were awarded disability benefits, as part of our judgment we remand this cause for determination of class certification with instructions that class certification should relate back to January 25, 1990.

The instant case can be distinguished from *Shipman v. Missouri Dep't of Family Servs.*, 877 F.2d 678 (8th Cir.1989), *cert. denied*, 493 U.S. 1045, 110 S.Ct. 842, 107 L.Ed.2d 837 (1990), in which this court held that where plaintiffs fail to file a motion requesting a ruling on the issue of class certification and the district court does not rule on the issue, the court loses jurisdiction where the named plaintiffs' personal claims become moot.

The initial determination of a claim for disability benefits is made by a state agency pursuant to regulations, guidelines and standards established by the Secretary. 42 U.S.C. §§ 421(a), 421(k)(1), 1383(a) (1988). If the initial determination is adverse, the claimant may request a de novo reconsideration of the claim by the same state agency. 20 C.F.R. § 404.904-.909 (1991). In Minnesota, the Disability Determination Services of the Minnesota Department of Jobs and Training (DDS) has been designated to handle these first two stages of the administrative adjudication process. The DDS acts under the authority and control of the Secretary. 42 U.S.C. §§ 421(a), 421(k)(1), 1383b(a) (1988); 20 C.F.R. §§ 404.1503(a), 416.903(a) (1991). Failure to seek a reconsideration renders the initial decision binding on the claimant. If the reconsideration is adverse, the claimant is entitled to a hearing by the Secretary and may request a de novo hearing before an administrative law judge (ALJ). 42 U.S.C. §§ 405(b)(1), 421(d), 1383(c)(1) (1988); 20 C.F.R. § 404.967-.981 (1991). Failure to request a hearing before an ALJ renders the adverse reconsideration a final decision. If the ALJ's decision is adverse to the claimant, the claimant may appeal that decision, within sixty days, to the Social Security Administration Appeals Council (Appeals Council). A final decision exists once the Appeals Council has denied review or has issued its own decision. After exhausting these remedies, a claimant may file a complaint in federal district court requesting an award of benefits pursuant to section 405(g). *See* 42 U.S.C. §§ 421(d), 1383(c)(3). In the present case, plaintiffs have admittedly not exhausted their administrative remedies.

This suit is not for benefits.[4] Unlike the plaintiffs in *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984), in which the relief sought was a change in the Secretary's policy so that the claimants would not have to resort to the administrative process to receive benefits, the relief sought by plaintiffs would not determine whether they would receive benefits. The relief sought is that defendants apply the same standards to plaintiffs' claims for benefits at each stage of the administrative process. *See* 42 U.S.C. § 421(k)(1) ("[t]he Secretary shall establish by regulation uniform standards which shall be applied at all levels of determination, review, and adjudication in determining whether individuals are disabled. . . ."). Plaintiffs allege that defendants do not follow the five-step analysis required by the Secretary's regulations.[5] Specifically, plaintiffs allege

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[4] At the time of this action, each individual claimant had been denied benefits in the initial and reconsideration level by the state defendants.

[5] *See Bowen v. City of New York*, 476 U.S. 467, 470, 106 S.Ct. 2022, 2024, 90 L.Ed.2d 462 (1986). Assuming a claimant is not engaged in substantial gainful activity and is found to suffer from an impairment which is severe and limits the claimant's basic work activity, then the administrative adjudication moves to the third step of the five step analysis. If the impairment is severe, the claim is evaluated under the third step of the analysis to determine whether the claimant's impairment meets or equals the severity of an appropriate listed impairment. If a claimant alleges disability based on alcoholism or dependency on another drug, the claim is evaluated under section 12.09 listings. If it does meet or equal a listed impairment under section 12.09, the claimant is conclusively presumed to be disabled. When the impairment is severe but is not listed, then the fourth stage of the analysis is used to assess the residual functional capacity (RFC) and

that at the third step of the analysis the adjudicator is also or alternatively required to consider whether the claimant is addicted to alcohol and has "lost the voluntary ability to control its use." *See Adams v. Weinberger*, 548 F.2d 239 (8th Cir.1977). Plaintiffs argue that *Adams* established an alternative to section 12.90 listings. *See supra* note 5. Although the ALJ and Appeals Council typically employ the *Adams* analysis at stage three, the state defendants allegedly do not. The record shows that at least two individuals who evaluate claims at the state level testified that neither the Secretary nor the Social Security Administration (SSA) had instructed DDS employees that they must determine whether a claimant can voluntarily control his or her use of alcohol when evaluating a claim for disability benefits due to drug dependency. These DDS employees were not aware of any such requirement and had never applied the *Adams* standard when evaluating such claims. Plaintiffs assert that as the *Adams* standard is considered by the ALJ and the Appeals Council it ought to be considered at the initial and reconsideration adjudications conducted by the state DDS at the direction of the SSA and the Secretary.

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to determine whether the claimant is able to perform work formerly done. If he is able, he is not considered disabled and the claim is denied. 20 C.F.R. §§ 404.1520(e), 416.920(e) (1991). If the claimant is not able to do the former work, the analysis moves to the fifth and final stage at which it is determined whether the claimant can do any other work available in the national economy given the age, education, and work experience of the person. If the claimant cannot do any work, disability is found. 20 C.F.R. § 404, subpart P, appendix 1 (1991).

Although to some extent the merits relate to the jurisdictional issue, resolution of the merits does not determine the question of jurisdiction. We address only whether the district court erred in its jurisdictional ruling.

Section 405(g)

In order for the district court to have subject matter jurisdiction under section 405(g),[6] a claimant must have presented a claim for benefits to the Secretary and exhausted the administrative remedies prescribed by the Secretary. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). The second element of jurisdiction, the exhaustion of the administrative remedies, although jurisdictional, is nonetheless deemed waivable. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 331 n.11, 96 S.Ct. 893, 900 n.11, 47 L.Ed.2d 18 (1976) (jurisdictional requirement of exhaustion under section 405(g) relates to the requirement of finality). As the district court notes, in the instant case the claimants, as defined in plaintiffs' motion for class certification, all satisfy the jurisdictional requirement that a claim for benefits has been made to the Secretary. The putative class consists entirely of individuals who have not exhausted the administrative remedies available to them, however. Therefore, in order for their

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[6] Title 42 U.S.C. § 405(g) specifies the following requirements for judicial review: (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision; and (3) filing of the action in an appropriate district court. *Weinberger v. Salfi*, 422 U.S. 749, 763-64, 95 S.Ct. 2457, 2465-66, 45 L.Ed.2d 522 (1975).

claims to be heard in federal court, exhaustion must be waived.

Under *Bowen v. City of New York*, 476 U.S. 467, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986), waiver of administrative exhaustion may be admitted only under special circumstances. The Secretary urges that such circumstances are present only where the challenged policy was adopted in secret and where (1) the issues were entirely collateral to the claim for benefits; (2) the injury could not be remedied by a retroactive payment; and (3) exhaustion would be futile. *City of New York*, 476 U.S. at 483, 106 S.Ct. at 2031, *aff'g*, *City of New York v. Heckler*, 742 F.2d 729 (2d Cir. 1984), *aff'g*, 578 F.Supp. 1109 (E.D.N.Y.1984). We agree that waiver of administrative remedies is the exception to the general rule. However, we find the present case presents an exceptional circumstance and waiver should be allowed.[7]

City of New York began as a class action challenging the SSA's internal policy of determining disability benefits based on a general listing of impairments instead of individual assessments. The district court declared that policy illegal, and the Secretary appealed the court's decision to grant relief to claimants who had failed to exhaust administrative remedies. The Supreme Court divided the class into two groups. Relief for the first group, for whom administrative remedies were no longer available when the internal policy became public, was affirmed with little explanation other than noting that requiring exhaustion

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[7] As the Court has explained, the Secretary has discretion to decide when to waive the exhaustion requirement, but cases may arise where deference to the agency's judgment is inappropriate. *Eldridge*, 424 U.S. at 330, 96 S.Ct. at 900.

would be unfair because the claimants could not have challenged the unknown policy. *City of New York*, 476 U.S. at 478-82, 106 S.Ct. at 2029-31; *see also Pittson Coal Group v. Sebben*, 488 U.S. 105, 123, 109 S.Ct. 414, 425, 102 L.Ed.2d 408 (1988). In addition, notwithstanding the fact that the second group of plaintiffs still had time to exhaust their administrative remedies at the time the suit was filed and the Secretary's secret policy was revealed, the Court found jurisdiction to review their claims under section 405(g). *City of New York*, 476 U.S. at 482-86, 106 S.Ct. at 2031-33. In view of these factors, the district court erred in ruling that a secret policy is a prerequisite to waiver of exhaustion. *Accord Marcus v. Sullivan*, 926 F.2d 604 (7th Cir.1991); *Bailey v. Sullivan*, 885 F.2d 52 (3d Cir.1989).

City of New York, relying on *Mathews v. Eldridge*, 424 U.S. 319, 331, 96 S.Ct. 893, 900, 47 L.Ed.2d 18 (1976), requires that claimants show (1) their claims are collateral to their claim of benefits; (2) that irreparable injury will follow; and (3) that exhaustion would otherwise be futile. We find that plaintiffs have established these prerequisites to waiver and that the district court erred in dismissing their claim against the defendants for lack of jurisdiction.

In the instant case, the district court refused to waive the requirement of exhaustion of administrative remedies, reasoning that (1) plaintiffs had not challenged a secret policy of HHS; (2) plaintiffs' claims were not collateral to their individual claims for benefits; and (3) claimants had not shown irreparable harm because exhaustion of their administrative remedies and awarding of retroactive benefits, where appropriate, would remedy the wrong. On this

basis, the district court concluded it did not have jurisdiction to entertain the complaint under section 405(g).

Although their present contentions may be intertwined with their claims for benefits, plaintiffs' claims are nonetheless sufficiently collateral to justify waiver of exhaustion. Here the class does not seek benefits in the district court, rather, as in *City of New York*, they challenge the Secretary's failure to ensure that uniform standards are applied at all levels of review. Like the claims in *City of New York*, the plaintiffs' claims in this case are collateral to their claims for benefits. Despite its close resemblance to the claim presented in *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984), the *City of New York* Court determined that the issue in *City of New York* was collateral because it involved the Secretary's failure to follow the applicable regulations. *See also Marcus v. Sullivan*, 926 F.2d 604 (7th Cir.1991); *Johnson v. Sullivan*, 922 F.2d 346, 351 (7th Cir.1991) (en banc); *New York v. Sullivan*, 906 F.2d 910, 912-13 (2d Cir.1990). In *City of New York*, the claimants were excused from administrative exhaustion and allowed to proceed directly to district court because they had challenged the very procedure by which their claims were processed.[8] The Court found that whether claimants re-

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[8] The central issue is whether plaintiffs' claims fall within the factual setting of *City of New York* or *Ringer*. In focusing on whether exhaustion should be waived, the Supreme Court in *City of New York* stated:

> This case is materially distinguishable from one in which a claimant sues in district court, alleging mere deviation from the applicable regulations in his particular administrative proceeding. In the normal course, such individual

ceived the "procedure they should have been afforded in the first place" was entirely collateral to the merits of their claims for benefits. *City of New York*, 476 U.S. at 484, 106 S.Ct. at 2032. The instant case presents a similar situation.

The district court's attempt to distinguish plaintiffs' claims as substantive rather than procedural is, under the existing circumstance, not a controlling factor.[9] The fact remains that plaintiffs' claims are independent of their claims for disability and thus are sufficiently collateral to support waiver of exhaustion.

Second, we find claimants have made a sufficient showing of irreparable harm resulting from the defendants' practices. Claimants have produced over 200 affidavits which clearly demonstrate the harms

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errors are fully correctable upon subsequent administrative review since the claimant on appeal will alert the agency to the alleged deviation. Because of the agency's expertise in administering its own regulations. the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context. Thus, our holding today does not suggest that exhaustion is to be excused whenever a claimant alleges an irregularity in the agency proceedings.

These claimants stand on a different footing from one arguing merely that an agency incorrectly applied its regulation. Rather, the District Court found a system-wide, unrevealed policy that was inconsistent in critically important ways with established regulations.

City of New York, 476 U.S. at 484-85, 106 S.Ct. at 2032-33.

[9] Analysis regarding whether something is procedural or substantive often leads to obtuse characterization of the issue. In the present case, plaintiffs assert that state officials are applying standards at the initial stages of review which are inconsistent with the Social Security Act and the Constitution. *See* supra n. 5.

caused by administrative exhaustion in these individual cases.[10] The district court held that retroactive benefits provided an adequate remedy. The overwhelming body of case law, however, is to the contrary. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) (months of delay in receipt of necessary Social Security income on which one has depended for the very necessities of life cannot be fully remedied by the "belated retroaction of benefits"); *Eldridge*, 424 U.S. at 331, 96 S.Ct. at 900 ("an erroneous termination [of benefits] would damage [claimant] in a way not recompensable through retroactive payments").

Finally, the district court determined that the purposes underlying the exhaustion doctrine would not be served if waiver were permitted in the present case. We must again respectfully disagree. The purposes of administrative exhaustion are set forth in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). In *Salfi*, the Court explained that exhaustion is required in order that "the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Id.* at 765. The *Salfi* Court found that exhaustion would have been futile and incon-

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[10] For example, Thomas Smith was homeless until he was awarded benefits by an ALJ 14 months after he had applied for benefits. Smith Decl. ¶ 15 Jt.App. 234, 236. Other members of the class, such as Jerome Arnold, Joseph Darikely and Dale Leonard, were living on the streets as of the date of this appeal because they could not find housing they could afford.

sistent with those policies, and characterized the relief ordered—reopening the claims—as showing "proper respect for the administrative process." *Id.* Indeed, stressing the pragmatic basis of the exhaustion doctrine, the Court has directed that the doctrine's application be governed by the policies underlying the exhaustion requirement rather than by "mechanical application of the *Eldridge* factors." *City of New York*, 476 U.S. at 484, 106 S.Ct. at 2032.

We find great similarity between the present case and *Mental Health Ass'n v. Heckler*, 720 F.2d 965 (8th Cir.1983).[11] In holding that administrative remedies should be waived, the *Mental Health Ass'n* court noted that the irreparable harm inherent in the pursuit of administrative relief and the apparent inadequacy of it to redress the interests of the class were not alleviated but rather exacerbated by reversals on appeal. *Id.* at 970. We agree with claimants' representation that eventual correction of the errors of DDS will not cure the alleged harm. As plaintiffs urge, even though exhaustion may often result in benefits being awarded it "*never* removes or corrects the systemic errors at the initial and reconsideration stage[s] of the administrative process." Appellants' brief at 31. As the Second Circuit stated in *Jones v. Califano*, 576 F.2d 12 (2d Cir.1978), under analogous circumstances, with exhaustion requirements "SSA could operate indefinitely . . . with two standards . . . one for claimants who seek review by the Appeals

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[11] *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984), involved the same issue, termination of mental health benefits, later challenged in the *City of New York* case.

Council, and one for claimants who do not." *Id.* at 17.

We think the most telling and forceful argument plaintiffs make is that unless exhaustion is waived, if the *ALJ* implements the correct procedures and applies the correct standards and, where appropriate, awards benefits, there will never be judicial review to challenge the actions the DDS takes at the initial and reconsideration stages. Exhaustion would be futile if the challenged policy could never be judicially reviewed. As stated in *City of New York:* "We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place." 476 U.S. at 484, 106 S.Ct. at 2032; *see also Barry v. Barchi*, 443 U.S. 55, 63 n. 10, 99 S.Ct. 2642, 2648 n. 10, 61 L.Ed.2d 365 (1979) (no need to exhaust procedures when action concerns the legality of those procedures); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 577 (2d Cir.1979) (to require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking); *Jones v. Califano*, 576 F.2d 12 (2d Cir.1978) (exhaustion waived because futile in light of the Secretary's final position and the possibility of repeated reversal on appeal frustrating review of the constitutional issue).

We conclude that the district court erred in failing to waive the exhaustion requirement of section 405(g) and in preventing the suit against the Secretary from proceeding.

Section 1361

Jurisdiction under section 1361 by way of writ of mandamus is sought only against the Secretary. Since we find waiver of exhaustion and jurisdiction against the Secretary established under section 405(g) review, we need not discuss the plaintiffs' mandamus claim.[12] We note, however, that this court and other courts have found an alternative basis for jurisdiction under section 1361 in similar circumstances. *See, e.g., Mental Health Ass'n v. Heckler*, 720 F.2d 965, 971 n. 71 (8th Cir.1983). On this ground the order dismissing the claim under mandamus is vacated. The district court may well choose to issue a writ of mandamus requiring the Secretary to direct the state officials to follow the Secretary's procedures and the standards of this circuit.

State Defendants

Plaintiffs assert jurisdiction against the state defendants under sections 1331 and 1343(3).[13] We think plaintiffs' reliance on section 1343(3) is misplaced. As stated by the Court in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.508 (1979):

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[12] Since we find jurisdiction under section 405(g), we need not discuss section 1331 jurisdiction as to the plaintiffs' constitutional claims against the Secretary. *See Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[13] 28 U.S.C. § 1343(3) states: "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

> The Social Security Act does not deal with the concept of "equality" or with the guarantee of "civil rights" as those terms are commonly understood. The Congress that enacted § 1343(3) was primarily concerned with providing jurisdiction for cases dealing with racial equality; the Congress that enacted § 1343(4) was primarily concerned with providing jurisdiction for actions dealing with the civil rights enumerated in 42 U.S.C. § 1985, and most notably the right to vote. While the words of these statutes are not limited to the precise claims which motivated their passage, it is inappropriate to read the jurisdictional provisions to encompass new claims which fall well outside the common understanding of their terms.

Chapman, 441 U.S. at 621, 99 S.Ct. at 1917 (footnote omitted).

Nonetheless, the allegation is made that the state defendants, acting under color of state law, violated the federal regulations and applicable federal law (as well as the United States Constitution). Under these circumstances, although plaintiffs do not expressly allege a violation under 42 U.S.C. § 1983 (1988), we find federal question jurisdiction sufficiently pled under section 1331. *See Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

The state defendants assert 42 U.S.C. § 405(h) (1988) bars federal question jurisdiction against them. We disagree. Section 405(h) reads: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [28 U.S.C. § 1331 et seq.] to recover on any claim arising under [Title II of the Social Security Act]." *See Wein-*

berger v. Salfi, 422 U.S. 749, 756, 95 S.Ct. 2457, 2462, 45 L.Ed.2d 522 (1975); *Schoolcraft*, 753 F.Supp. at 1478, 1490. This provision expressly applies only to officials of the United States. Although DDS is responsible for carrying out the Secretary's regulations and policies, it operates pursuant to state statutory authority. *See* Minn.Stat. § 268A.03(e) (1990). The Commissioner of Department of Jobs and Training is required to:

> maintain a contractual or regulatory relationship with the United States as authorized by the Social Security Act, as amended. Under this relationship, the state will undertake to make determinations referred to in those public laws with respect to all individuals in Minnesota, or with respect to a class or classes of individuals in this state that is designated in the agreement at the state's request. It is the purpose of this relationship to permit the citizens of this state to obtain all benefits available under federal law.

Minn.Stat. § 268A.03(d).

The state defendants are neither officers nor employees of the federal government.[14]

Claimants allege that these state officers in their official capacities, acting under color of state law, violated federal law and the United States Constitution by failing to apply the proper criteria. On this basis plaintiffs properly assert federal question jurisdiction under section 1331.

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[14] In this regard we disagree with the holding of the Second Circuit that the state defendants are acting solely as agents of the United States. *See Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981).

Whether the challenged practices and policies are inconsistent with or violative of the Secretary's policies is an issue for the district court to resolve. If plaintiffs' claims have merit, as the depositions of the state officers indicate, perhaps the Secretary and the claimants can settle their differences. If the individuals are harmed, as plaintiffs have alleged, the institutional concern should be great and the wrong readily remedied.[15]

The judgment dismissing the plaintiffs' claim for lack of jurisdiction is vacated and the cause is remanded for further proceedings in accordance with this opinion.

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[15] This entire litigation is somewhat bewildering to this court. In oral argument the government stated that there is no merit to plaintiffs' claims because the DDS presently adheres to the SSA's standards and regulations which purportedly comply with the legal standards and procedures claimants deem applicable. Thus, the issue is whether the plaintiffs are correct in asserting that the Secretary has failed to properly instruct the state officials to do what the Secretary agrees should be done. If all this is true, the Secretary can easily remedy this dispute and save everyone a great deal of time and expense by entering into a consent judgment in the district court specifically stating the applicable standards are to be applied to each stage of the claim evaluation process.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. No. 4-90-53

DANIEL J. SCHOOLCRAFT, THEODORE THOMAS, and JOSEPH L. DRUMBEATER, individually and on behalf of all others similarly situated, PLAINTIFFS

v.

LOUIS W. SULLIVAN, M.D., Secretary of the Department of Health and Human Services, ET AL., DEFENDANTS

Jan. 3, 1991

ORDER

DOTY, District Judge.

This matter is before the court on plaintiffs' motion for class certification and defendants' motion to dismiss for either lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted, or in the alternative, for summary judgment. Based on the file, record and proceedings herein, the court grants defendants' motion for summary judgment.

BACKGROUND

The plaintiffs bring this action to challenge the administrative process for evaluating social security disability claims in which the claimants allege alcoholism or other substance abuses as the basis for their disability.

Titles II and XVI of the Social Security Act provide monthly disability benefits to persons who are unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment."[1] 42 U.S.C. § 423(d)(1)(A); 42 U.S.C. § 1382c(a)(3)(A). The definition of disability is stringent because the Act does not permit benefits for partial disabilities. *Stephens v. Heckler*, 766 F.2d 284, 285 (7th Cir.1985). The Act further imposes a durational requirement: an impairment must be disabling for a continuous period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A); *Timmerman v. Weinberger*, 510 F.2d 439, 443 (8th Cir. 1975). Thus, medical conditions which are episodic and do not last for a continuous 12-month period cannot constitute a disability within the meaning of the Social Security Act, even if they are disabling for recurrent periods of less than twelve months. *See, e.g., Maher v. Secretary of Health & Human Servs.*, 898 F.2d 1106, 1109 (6th Cir.1989) (citing *Schaffer v. Califano*, 433 F.Supp. 1218, 1224 (D.Md. 1977)). In order to obtain benefits under Titles II or XVI, a person must file a claim with the Secretary alleging,

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[1] The regulations setting the disability standards under Titles II and XVI are the same in all relevant respects. *Sullivan v. Zebley*, —— U.S. ——, 110 S.Ct. 885, 888 n. 3, 107 L.Ed.2d 967 (1990).

among other things, the condition or impairment which disables, and the date on which the disability began. Once a claimant is deemed "disabled", benefits will continue as long as other nondisability related criteria are met unless the claimant's medical condition has improved to the point where substantial gainful activity can be performed.[2]

The Secretary has established a four-tier administrative appeals process to resolve disputed disability claims. The "initial determination" of a claim is made by a state agency pursuant to regulations, guidelines, and performance standards established by the Secretary (Initial Stage). 42 U.S.C. §§ 421(a), 1383b(a). If the initial determination is adverse, the individual may request within 60 days a de novo reconsideration by the same state agency. (Reconsideration Stage). Failure to seek further review renders the initial determination binding. After an adverse reconsideration decision, the claimant becomes "entitled to a hearing thereon by the Secretary". 42 U.S.C. §§ 421(d), 1383(c)(1). The claimant may request a de novo hearing before an administrative law judge (ALJ) within 60 days after the adverse reconsideration determination. 42 U.S.C. §§ 405(b)(1), 1383(c)(1). Failure to request an ALJ hearing renders the reconsideration determination binding. At the fourth stage, the claimant may appeal an adverse ALJ

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[2] There are certain circumstances in which the Secretary may find that a disability has ended even though medical improvement has not occurred, provided the claimant also can perform substantial gainful activity under the circumstances. For example, benefits may be terminated without medical improvement if the recipient has undergone vocational therapy. 42 U.S.C. § 423(f)(2).

decision, within 60 days, to the Appeals Council, the highest appellate tribunal within the Social Security Administration. If the claimant fails to make a timely request for such review, the ALJ decision becomes binding. For purposes of judicial review, a determination of an individual's claim for benefits becomes a "final decision" only after the Appeals Council has either denied review or granted review and issued its own decision. This final decision then is subject to judicial review pursuant to 42 U.S.C. § 405(g). *See* 42 U.S.C. §§ 421(d), 1383(c)(3).

In Minnesota, a state agency called the Disability Determination Services of the Minnesota Department of Jobs and Training (DDS) has been designated by the Secretary to handle the first two stages of the administrative process. Thus, the DDS determines whether the claimant is disabled at the Initial Stage. If unsuccessful at the Initial State, the claimant may ask the DDS for a reconsideration. If unsuccessful at the Reconsideration Stage, the claimant may request a hearing before an administrative law judge who is employed by the Social Security Administration.

Throughout the four-tier administrative appeals process, a five-step analysis is used to determine whether a claimant is "disabled" for purposes of the Act. In the first step, the Secretary determines if the claimant is working or engaged in "substantial gainful activity" at the time of the determination. If yes, the claim for benefits is automatically denied. 20 C.F.R. §§ 404.1520(a) & (b), 416.920(a) & (b) (1989). If the claimant is not engaged in substantial gainful activity, the Secretary moves to the second step of the process and determines whether the claimant has a physical or mental impairment which is

"severe". An impairment is considered severe if it significantly limits a claimant's physical or mental ability to perform basic work activity. If an impairment is not severe, the claimant is not considered to be disabled and the claim is denied. 20 C.F.R. §§ 404.-1520(c), 416.920(c) (1989). If the claimant is determined to have a severe impairment, the Secretary moves to the third step to determine whether the claimant's impairment meets or equals the severity of an appropriate listed impairment. A listed impairment is one which is included, with its symptoms, in the regulations governing the Title II and Title XVI programs. If the Secretary determines that the claimant has an impairment which meets or equals the characteristics of a listed impairment the claimant is conclusively presumed disabled. 20 C.F.R. §§404. 1520(d), 416.920(d) (1989). If the claimant's impairment does not meet or equal a listing, the Secretary goes to the fourth step to determine whether the claimant is able to do work formerly done. If the claimant is able to do the former work the claimant is not considered disabled and the claim is denied. 20 C.F.R. §§ 404.1520(e), 416.920(e) (1989). If the claimant is not able to perform the former work, the Secretary moves on to the fifth step to determine whether the claimant can do any other work available in the national economy, given the age, education, and work experience of the person. If the claimant cannot do any other work, disability is found. 20 C.F.R. §§ 404.1520(f), 416.920(f) (1989).

At the third step of the evaluation process, if a claimant alleges disability based on alcoholism or drug dependency, the claim is evaluated under § 12.09 of the listings, entitled "Substance Addiction Dis-

orders". 20 C.F.R., Part 404, Subpart P, Appendix 1 (1989). Section 12.09 is structured as a reference listing, *see id.* § 12.00(A), which merely identifies other sections of the regulations that are to be used when evaluating the behavioral, mental, or physical changes resulting from the claimant's regular use of addictive substances. To establish a conclusive presumption of disability, the claimant meets the required level of severity if the requirements of any one of nine categories listed under § 12.09 are met. The plaintiffs contend that the Eighth Circuit has, in *Adams v. Weinberger*, 548 F.2d 239 (1977), articulated an additional standard which is equivalent to nine § 12.09 listings and which must be used to evaluate disabilities based on alcoholism or drug dependence.[3] Under the plaintiffs' interpretation, the *Adams* case mandates that in evaluating such disability claims, "the emphasis should be placed on whether the claimant is addicted to alcohol and as a consequence has lost the voluntary ability to control its use." *Id.* at 244. The plaintiffs further contend that the DDS does not apply the *Adams* standard and thus improperly denies benefits at the first two stages of the administrative process, the Initial and Reconsideration Stages.

The plaintiffs seek class certification for all those individuals alleging disability based on alcoholism or other substance abuse who have been denied benefits at the first two stages of the administrative process. The plaintiffs' initial motion for conditional class cer-

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[3] The plaintiffs note that nine categories in § 12.09 represent the Secretary's current policy, but claim that the categories conflict with *Adams*. At the time *Adams* was decided § 12.09 was not in effect.

tification was denied by this court in an order dated February 5, 1990. The plaintiffs now renew the motion, seeking to represent a class of persons defined as follows:

> All persons residing in Minnesota:
>
> 1. Who have filed or will file an application for Title II and/or Title XVI disability benefits, or who receive or will receive Title II and/or Title XVI disability benefits;
>
> 2. Who allege that they are unable to work in whole or in part because of alcoholism or another drug dependency;
>
> 3. Who have been or will be denied or terminated by defendants either in an initial or a reconsideration determination;
>
> 4. Who have not received a subsequent decision on the application or termination from an administrative law judge; and
>
> 5. Whose initial determination was on or after January 25, 1989, or whose reconsideration determination was on or after November 21, 1989.

The plaintiffs note that none of the named plaintiffs had exhausted their administrative remedies at the time this action was filed. The plaintiffs' complaint also confirms that none of the members of the proposed class would ever exhaust their administrative remedies because the class is defined to include only those persons who have had their claims for disability benefits denied or terminated at the first two levels of administrative review. The complaint further specifies that persons who do reach the third step of the appeals process and receive an ALJ decision auto-

matically leave the class, regardless of whether the ALJ's decision was favorable or unfavorable. Therefore, it is undisputed that the named plaintiffs and the proposed class members have failed to exhaust their administrative remedies.

The plaintiffs also concede that exhaustion of administrative remedies would eliminate the errors of which they complain. The plaintiffs only allege that the DDS does not apply the *Adams* standard at the Initial or Reconsideration Stages to evaluate claims based, in whole or in part, on alcoholism or other drug dependency. In other words, if a claimant's impairment does not meet a § 12.09 listing at either the Initial or Reconsideration Stage, that claim is denied or benefits are terminated without any application of the so-called *Adams* standard. The plaintiffs contend, however, that the administrative law judges correctly apply the *Adams* standard at the third stage of the administrative process.[4] The plaintiffs therefore concede that any such errors in the first two stages of the administrative process are subsequently corrected at the later stages of the administrative process.

The history of the named plaintiffs' claims highlight the significance of the plaintiffs' concession that exhaustion of administrative remedies would not be futile. Joseph Drumbeater applied for supplemental security income (SSI) on November 29, 1988. Drumbeater was denied benefits in Initial and Reconsideration determinations dated February 8 and June 23, 1989. On March 12, 1990, Drumbeater had a hearing

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[4] Despite their assertion that the ALJs correctly apply the *Adams* standard in the third step of the evaluation process, plaintiffs also note that only 59% of the favorable ALJ decision [sic] specifically rely on the *Adams* case.

before an administrative law judge, who granted benefits from December 1, 1986, the date on which Drumbeater claimed his disability had begun.

Daniel J. Schoolcraft filed for Title II disability and SSI benefits on September 9, 1989. After his claim was denied at the initial level, Schoolcraft requested reconsideration on November 13, 1989. On March 22, 1990, the DDS awarded Schoolcraft benefits on both his applications, finding him disabled since September 1, 1989.

Theodore Thomas filed his second application for Title II disability benefits on July 26, 1989, alleging disability due to alcoholism since July 28, 1981. To receive Title II disability benefits a claimant must establish that he was disabled on or before the date of the expiration of his insured status. 42 U.S.C. § 416(i)(3). Thomas alleged disability due to alcoholism since July 28, 1981, and further alleged that his insured status for Title II disability benefits had expired after the onset of his disability on December 31, 1982. Thus, Thomas claimed he was eligible for Title II benefits. After initial and reconsideration denials, Thomas requested an ALJ hearing. On February 9, 1990, the ALJ dismissed the Title II claim because Thomas's previous application for Title II benefits was based on the same time period and had already been denied. The ALJ refused to reopen this earlier decision, thus the question of whether Thomas had been disabled prior to the expiration of his insured status may not be relitigated. The ALJ's decision not to reopen the prior decision is not subject to judicial review. *Califano v. Sanders*, 430 U.S. 99, 102-04, 97 S.Ct. 980, 982-83, 51 L.Ed.2d 192 (1977).

Thomas also filed a claim for SSI benefits. Before he received either an initial or reconsideration deci-

sion on this claim, Thomas requested that it be accelerated to the ALJ level so that it could be determined with his Title II claim. The ALJ dismissed his Title II claim, *supra*, but did not dismiss Thomas's SSI claim because the date of the termination of his insured status is irrelevant for a claim of SSI benefits. Because Thomas's Title II claim was dismissed, however, the ALJ denied the acceleration request and remanded the case to the DDS for an initial determination. Thomas's SSI claim remains pending before the DDS.

The plaintiffs contend that this court has jurisdiction to hear their claims under three separate provisions: (1) the provisions for judicial review of final administrative decisions pursuant to the Social Security Act, 42 U.S.C. § 405(g), 1383(c)(3); (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331; and (3) mandamus jurisdiction pursuant to 28 U.S.C. § 1361. The defendants contend that jurisdiction is inappropriate under all three provisions and ask this court to dismiss the case for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted, or in the alternative, to grant summary judgment.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This standard mirrors the standard for a directed

verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Stated in the negative, summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248, 106 S.Ct. at 2510. With this standard at hand, the court will consider the defendants' motion for summary judgment.

A. *Jurisdiction Pursuant to 42 U.S.C. § 405(g)*

Jurisdiction for judicial review of final decisions by the Secretary is provided by 42 U.S.C. § 405(g),[5] which states that:

> Any individual, after any final decision of the Secretary made after a hearing to which he is a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides. . . .

The Supreme Court has held that the "final decision" requirement of § 405(g) consists of two separate elements: the jurisdictional nonwaivable requirement that a claim for benefits has actually been

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[5] 42 U.S.C. § 1383(c)(3), which deals with claims for supplemental security income, incorporates the standard of judicial review provided in § 405(g).

presented to the Secretary, and the waivable requirement that the claimant has exhausted all administrative remedies. *Bowen v. City of New York*, 476 U.S. 467, 482-83, 106 S.Ct. 2022, 2031-32, 90 L.Ed.2d 462 (1986) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 18 (1976)). In the present case, the class of claimants, as defined in plaintiffs' motion for class certification, all meet the first element of § 405(g), the jurisdictional requirement that a claim for benefits has been made. The proposed class, however, consists exclusively of persons who have not met the second requirement, exhaustion of their administrative remedies. The class consists of all persons who have been denied benefits at only the first two levels of administrative review, the Initial and Reconsideration Stages. By definition, these claimants have neither pursued the third stage of appeal, a de novo hearing before an ALJ, nor the fourth stage, an appeal of an adverse ALJ decision to the Appeals Council. The plaintiffs contend that this court should waive the exhaustion requirement so that it will have jurisdiction under § 405(g) to decide the claims of the proposed class.

In evaluating the application of the exhaustion requirement, the Supreme Court has explained that:

> the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue. Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to

compile a record which is adequate for judicial review.

Weinberger v. Salfi, 422 U.S. 749, 765, 95 S.Ct. 2457, 2466-67, 45 L.Ed.2d 522 (1975) (citations omitted). The Court further noted that the exhaustion requirement is "something more than a simple codification of the judicially developed doctrine of exhaustion." *Id.* at 766, 95 S.Ct. at 2467. The language of § 405 (g) itself also supports the exhaustion requirement by providing that an individual may obtain judicial review only "after a final decision of the Secretary made after a hearing to which he was party." Interpreting this language, the Court has held that a final decision is a condition of Congress's waiver of sovereign immunity, and thus is "central to the requisite grant of subject-matter jurisdiction." *Salfi*, 422 U.S. at 764, 95 S.Ct. at 2466. The Social Security Act does not define "final decision," leaving it to the Secretary to specify what constitutes the "final decision" which terminates the administrative process and triggers the right to judicial review. *Id.* at 766 & n. 9, 95 S.Ct. at 2467 & n. 9. The Secretary in turn "has provided that a 'final decision' is rendered on a . . . claim only after the individual claimant has pressed his claim through all designated levels of administrative review." *Heckler v. Ringer*, 466 U.S. 602, 606, 104 S.Ct. 2013, 2017, 80 L.Ed.2d 622 (1984) (interpreting "final decision" for Medicare claims); *Salfi*, 422 U.S. at 765, 95 S.Ct. at 2466-67 (interpreting finality under § 405(g)). The Supreme Court has also held that in class actions where jurisdiction is based on § 405(g), a class ordinarily may be certified only to the extent that each of its members individually satisfies all jurisdictional requirements, including the

final decision requirement. *Salfi*, 422 U.S. at 764, 95 S.Ct. at 2466 (discussing jurisdictional requirements for a class under § 405(g)); *cf. Califano v. Yamasaki*, 442 U.S. 682, 701, 703, 99 S.Ct. 2545, 2557-58, 2558-59, 61 L.Ed.2d 176 (1979) (involving certification of a class action under 42 U.S.C. § 405(g)). Moreover, the Supreme Court has specifically held that where the plaintiffs have fulfilled the nonwaivable requirement of presenting a claim for benefits, but have failed to satisfy the exhaustion requirement, the action should be dismissed under § 405(g). *Ringer*, 466 U.S. at 617-19, 104 S.Ct. at 2022-24.

Despite the general requirement of exhaustion, the Supreme Court has recognized that exhaustion may be waived in certain rare circumstances. The plaintiffs rely on *Bowen v. City of New York*, 476 U.S. 467, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986), as controlling authority on the question of whether this court should waive the exhaustion requirement.[6] In *City of New*

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[6] Plaintiffs also cite a number of lower court decisions which have excused the exhaustion requirement. *See, e.g., Wilkerson v. Bowen*, 828 F.2d 117, 121-22 (3rd Cir.1987); *Polaski v. Heckler*, 751 F.2d 943, 951-52 (8th Cir.1984). However, with one exception, none of the cases involve the key admission made by the plaintiffs in the present case that exhaustion of administrative remedies would remove the errors of which plaintiffs complain. The one exception, *Jones v. Califano*, 576 F.2d 12 (2d Cir.1978), is easily distinguished from the present case. First, it predates the now controlling *City of New York* case. Moreover, *Jones* involved one disputed issue of statutory construction and the Secretary's interpretation had already been judged incorrect by both the Appeals Council of the Social Security Administration and a federal court. *Id.* at 17, 20-21. In contrast, the present case does not involve only one issue of statutory interpretation. Moreover, there has been no ruling on the merits which has been adverse

York, the plaintiffs brought a class action seeking relief on behalf of all individuals residing in New York who had, within a specified time period, been denied disability benefits or whose benefits had been terminated pursuant to an allegedly illegal and secret internal policy of the Secretary. *Id.* at 473, 106 S.Ct. at 2026. The Court waived exhaustion on the basis of the "unique circumstances" presented in *City of New York*, specifically "a systemwide, unrevealed policy that was inconsistent in critically important ways with established regulation" and was nevertheless being used to evaluate an entire class of claims. *Id.* at 485, 106 S.Ct. at 2032. The Court waived exhaustion for currently pending claims because "[m]embers of the class could not attack a policy they could not be aware existed", and thus it would be unfair to penalize the claimants for not exhausting their administrative remedies under the circumstances. *Id.* at 482, 106 S.Ct. at 2031 (citation omitted). Moreover, "under these unique circumstances, there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *Id.* The Supreme Court specifically distinguished the *City of New York* claimants from those persons "arguing merely that an agency incorrectly applied its regulation." *Id.* The Supreme Court also emphasized that even in situations where the court has found a legally incorrect policy, such a finding still would not necessarily justify a waiver of the exhaustion requirement. The Court expressly stated that it did not "suggest that

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to the Secretary; indeed, the Third Circuit recently upheld § 12.09 in *Petition of Sullivan*, 904 F.2d 826, 845 (3rd Cir. 1990).

every internal policy that is . . . inconsistent with legal requirements" and "touches upon the outcome of a class of cases" would justify "excusing exhaustion". *Id.* at 487, 106 S.Ct. at 2033-34. In *City of New York*, the Supreme Court has thus required a very high standard to excuse exhaustion, emphasizing that exhaustion "is the rule in the vast majority of cases." *Id.* at 486, 106 S.Ct. at 2033.

In the present case the policies challenged by the plaintiffs clearly are not secret. The Secretary's standards for evaluating alcoholism and substance addiction claims are published in Social Security Ruling 82-60 and in § 12.09 of the listing of impairments. 20 C.F.R. Part 404, Subpart P, Appendix 1 (1989). The plaintiffs allege the incorrect handling of disability claims based on alcoholism or drug dependence in the first two stages of the administrative process, but they do not allege a secret policy and thus, a central premise of the *City of New York* holding is absent.[7] Moreover, the plaintiffs admit that in the present case, unlike *City of New York*, there is no systemwide problem in the appeals procedure, conceding that any alleged errors at the first two levels of the administrative process are corrected by appeal to administrative law judges.

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[7] *Cf. Pittston Coal Group v. Sebben*, 488 U.S. 105, 109 S.Ct. 414, 102 L.Ed.2d 408 (1988). In *Pittston*, the Supreme Court refused to excuse the limitations period for seeking review by simply noting that, unlike *Bowen v. City of New York*, "the agency action here was not taken pursuant to a secret internal policy, but under a regulation that was published for all to see." *Id.* at 123, 109 S.Ct. at 425. *See also Petition of Sullivan*, 904 F.2d 826, 833 n. 7 (3rd Cir.1990) (noting that a "secret policy permits tolling of the time in which to seek judicial review of a denial of benefits").

The present plaintiffs also allege no policy which is inconsistent with statute or regulations, but instead claim that the DDS denial of benefits at the first two stages of the administrative process is improper because it conflicts with a 1977 Eighth Circuit case, *Adams v. Weinberger*, 548 F.2d 239 (8th Cir.1977). In discussing the difficulty of analyzing claims of disability based on alcoholism, the *Adams* court noted that when evaluating such a claim, "the emphasis should be placed on whether the claimant is addicted to alcohol and as a consequence has lost the voluntary ability to control its use." *Id.* at 244 (citations omitted). The plaintiffs argue that this language sets up an additional standard which the Secretary must use in step three of the five-step analysis when evaluating disability based on alcoholism or drug dependency, a standard that is equivalent to the other nine § 12.09 listings. *See* 20 C.F.R. Part 404, Subpart P, Appendix 1 (1989). The plaintiffs contend that the DDS, during the Initial and Reconsideration Stages of the appeals process, does not apply this additional, allegedly mandatory, standard when reaching step three of the disability analysis, and therefore improperly denies or terminates benefits. Under step three of the five-step evaluation process, however, the Secretary does not automatically award disability benefits whenever a claimant evidences a lack of control over drinking or drug use, but rather goes on to consider whether the claimant, under the totality of circumstances, is unable to engage in substantial gainful employment. *See Sullivan*, 904 F.2d at 845. The plaintiffs essentially argue that *Adams* establishes a per se disability test, that is, the disability inquiry should end at step three of the evaluation process on the mere diagnosis of alcoholism. Thus, persons claiming

alcoholism or other substance abuse as a disability would not be required to show that their impairments were severe enough to preclude substantial work. Interpreting *Adams* in this fashion, however, contradicts congressional intent to limit disability benefits under the Social Security Act to only those persons who are unable to perform substantial gainful activity. *See* 20 C.F.R. §§ 404.1520(a) & (b), 416.920(a) & (b) (1989).

The plaintiffs' interpretation of *Adams* is also questionable for a number of other reasons. The *Adams* language on which plaintiffs rely was written in response to an ALJ's finding that Adams could "cure" his disability merely by stopping his drinking. The ALJ thus determined that Adams was not disabled, relying on a social security regulation which stated that remediable conditions could not be disabling. The Eighth Circuit noted that courts should focus on whether a claimant possesses the voluntary ability to stop drinking when determining whether his or her alcoholism was a remediable condition. Contrary to plaintiffs' claims, the *Adams* court was not thereby announcing a new standard for evaluating alcoholism as a disability. The *Adams* court never suggested that it was establishing an additional disability standard, but rather indicated that it was merely construing the disability regulations in effect in 1977.[8] 548 F.2d at 242-44. *Adams* thus merely

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[8] The reglations interpreted by the *Adams* court have since been replaced by the nine categories in § 12.09 of the current social security regulations. The plaintiffs in the present case assert that § 12.09 is the Social Security Administration's current policy and that it conflicts with *Adams*. In *Petition of Sullivan*, the Third Circuit examined the current policy under § 12.09 and held that it did not violate prior court of

interpreted the then-existing social security regulations, it did not seek to impose an additional standard when a claimant alleged disability because of alcoholism or drug dependency. *Cf. Heckler v. Campbell*, 461 U.S. 458, 466, 103 S.Ct. 1952, 1956-57, 76 L.Ed.2d 66 (1983) (holding that where a social security statue expressly delegates to the Secretary the responsibility for implementing a provision, the court's review is limited to determining whether the resulting regulation exceeded the Secretary's statutory authority and whether the regulation is arbitrary and capricious). Nothing in the *Adams* decision states that the standard set forth in that case must be specifically incorporated by the Secretary at the listing stage, step three of the five-step evaluation procedure. The plaintiffs' contention that the *Adams* standard is the equivalent of a § 12.09 listing is thus unsupported by any language in *Adams*.

The plaintiffs' interpretation of *Adams* also ignores language in *Adams*, as well [sic] language in subsequent Eighth Circuit decisions, which provides that in addition to considering the issues of addiction and the voluntary ability to control substance use, the Secretary's evaluation of an alcoholism claim must also include an inquiry into whether the claimant's disability is "the kind of disability with which the [Social Security] Act is intended to deal." *Adams*,

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appeals' decisions. 904 F.2d 826, 844-47 (3rd Cir.1990). Specifically, the Third Circuit found that the current policy does not violate either *McShea v. Schweiker*, 700 F.2d 117 (3rd Cir.1983), or *Purter v. Heckler*, 771 F.2d 682 (3rd Cir.1985), two cases on which the current plaintiffs rely. *Id.* at 844-45. The Third Circuit further held that the § 12.09 listings do not violate the Social Security Act. *Id.* at 847.

548 F.2d at 245 (citations omitted); *Cruse v. Bowen*, 867 F.2d 1183, 1186 (8th Cir. 1989) (noting that "the mere presence of alcoholism is not necessarily disabling"); *Metcalf v. Heckler*, 800 F.2d 793, 796 (8th Cir.1986) (citing *Adams* for the proposition that "in order to establish a disability predicated on alcoholism, the claimant must show: (1) that he has lost self-control to the point of being 'impotent to seek and use means of rehabilitation,' and (2) that his disability is encompassed by the [Social Security] Act"). Disability under the Act requires both the presence of a medical impairment and the inability by reason of that impairment to perform any substantial gainful activity. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). To the extent that plaintiffs interpret *Adams* to mandate a finding of disability without further consideration of the effects of alcoholism on a claimant's ability to work, their interpretation is contrary to the plain language of the social security statute.[9] *Adams* also does not support such an interpretation; on the contrary, it acknowledges that a claimant's alcoholism must be "the kind of disability with which the Act is intended to deal." *Adams*, 548 F.2d at 245. The plaintiffs' interpretation of *Adams* thus seeks to

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[9] In *Petition of Sullivan*, the Third Circuit specifically rejected an argument identical to the plaintiffs', emphasizing that:

> Not all persons whose abuse of alcohol has progressed to the point that they are unable to control their drinking are incapable of any gainful employment. Common medical understanding does not square with an assumption that every person who meets the clinical definition of alcoholism, and is thus unable to control his drinking, is *ipso facto* unable to perform *any* gainful activity.

904 F.2d 826, 845 (3rd Cir.1990) (emphasis in original).

establish a standard that is unsupported by *Adams* and by subsequent Eighth Circuit case law.

The plaintiffs in the present case, unlike those in *City of New York*, allege no secret agency policy, relying instead on a questionable interpretation of the *Adams* case. In addition to the presence of a secret policy, the Supreme Court in *City of New York*, also considered three other factors when determining whether exhaustion should be waived: (1) whether the claim for which exhaustion is sought is entirely collateral to the claim for benefits; (2) whether class members would be irreparably injured if required to exhaust their administrative remedies; and (3) whether completing the administrative appeals process would serve the purposes underlying the exhaustion requirement, specifically that "because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context". 476 U.S. at 483-85, 106 S.Ct. at 2031-33. These additional factors will be examined to determine if exhaustion should be waived in the present case.

In *City of New York*, the Court considered whether the claim raised by the plaintiffs was entirely collateral to their claim for benefits, reasoning that waiver of exhaustion would be indicated in cases where the claims raised were entirely collateral to the plaintiffs' claims for benefits. *Id.* at 483, 106 S.Ct. at 2031-32 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 330, 96 S.Ct. 893, 990, 47 L.Ed.2d 18 (1976)). In *City of New York*, the plaintiffs sought to vindicate a separate procedural right, the right to have their claims decided according to the Secretary's published criteria, rather than the secret policy which they al-

leged was being used. *Id.* at 482-83, 106 S.Ct. at 2031-32. Similarly, in *Mathews v. Eldridge*, the claimant challenged a procedural rule which provided a hearing only after a person's benefits had been terminated. 424 U.S. at 324-26, 96 S.Ct. at 897-99. Eldridge, however, did not challenge the merits of the termination of his benefits, only the adequacy of the termination process used. The Supreme Court waived exhaustion because Eldridge's challenge to the hearing procedure was entirely collateral to his claim for benefits. *Id.* at 330-31, 96 S.Ct. at 900-01.

In the present case, however, this factor does not justify the waiver of exhaustion because the present plaintiffs' claims are not collateral to their claims for benefits. The plaintiffs contend that persons who lack the ability to voluntarily control their drinking are, on the basis of *Adams*, entitled to a presumption of disability in step three of the evaluation process without reference to the listings under § 12.09. The plaintiffs thus are not merely asking for a pretermination hearing (as in *Eldridge*) or challenging the failure to adhere to published regulations (as in *City of New York*), they instead challenge the Secretary's substantive standards governing the entitlement to benefits. The Supreme Court has already held in *Heckler v. Ringer* that such claims are not collateral, but rather are inextricably intertwined with a respondent's claim for benefits. 466 U.S. 602, 614, 104 S.Ct. 2013, 2021, 80 L.Ed.2d 622 (1984); *Smith v. Schweiker*, 709 F.2d 777 (2d Cir.1983). In *Smith v. Schweiker*, the Second Circuit explained in similar circumstances that:

> The claims raised in this action are hardly collateral to the demand for benefits. Unlike Eld-

> ridge, who was asserting a right to a particular kind of procedure to which he was not entitled under the Secretary's regulations, the plaintiffs here claim only that, depending on the evidence adduced, an illegal termination of their benefits may result from the application of the Secretary's test for current disability.

Id. at 780. The present case also fails to raise claims that are entirely collateral to the claims for benefits, and thus under *City of New York*, the absence of this factor argues against waiver of the exhaustion requirement.

The plaintiffs in the present case also fail to demonstrate irreparable harm, another factor considered by the Court when waiving exhaustion in *City of New York*, 476 U.S. at 483-84, 106 S.Ct. at 2031-32. In excusing exhaustion the Court heavily relied upon the district court's finding that the *City of New York* class members would suffer irreparable harm, not merely because their benefits would be denied, but because the class of plaintiffs as defined had severe mental disturbances, and requiring them to exhaust their administrative remedies could trigger severe medical setbacks. *Id.* The Court further noted that many of the *City of New York* plaintiffs did have to be hospitalized because of the trauma resulting from the wrongful termination of their disability benefits. *Id.* at 484, 106 S.Ct. at 2032. In contrast, the plaintiffs in the present case do not allege that benefits would be denied throughout the administrative process, admitting that any alleged errors in the process are corrected at the ALJ stage. The plaintiffs also do not demonstrate that exhausting the administrative process would itself cause irreparable harm to any

class members. Unlike the class members in *City of New York*, the members of the proposed class in the present case are no different than any other claimant who has been denied benefits at the initial stages of the administrative process. Moreover, in establishing a multi-tiered review process, Congress impliedly determined that a retroactive award of benefits at a later administrative stage is a fully adequate remedy to any injury stemming from an incorrect denial of benefits at an earlier administrative stage. *See, e.g., Ringer*, 466 U.S. at 627, 104 S.Ct. at 2028 (reasoning that "Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year"). The plaintiffs also fail to demonstrate that any delay resulting from the exhaustion requirement has actually harmed any of the named plaintiffs. Indeed, the plaintiffs' delay in filing this lawsuit belies any claims of irreparable harm stemming from the delay imposed by the administrative process. Thus, the absence of any irreparable injury also undercuts the plaintiffs' request that exhaustion be waived.

The final factor examined by the Court in *City of New York* was whether completing the administrative process would serve the purposes underlying the exhaustion requirement. 476 U.S. at 484-85, 106 S.Ct. at 2032-33. As the Supreme Court emphasized in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), the exhaustion requirement is intended to prevent "premature interference with agency processes" so that:

> the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Id. at 765, 95 S.Ct. at 2466-67 (citations omitted). All of the justifications for requiring exhaustion are present in this case. In sharp contrast to *City of New York*, the plaintiffs in the present case openly concede that exhaustion will remove the alleged errors in the administrative process. Moreover, the complexity of alcoholism and drug addiction also supports the exhaustion requirement by allowing the administrative process to proceed on a case-by-case basis to determine whether a particular claimant has the ability to control his or her drinking or drug abuse, and if not, whether the person can nevertheless perform any substantial gainful activity.[10] *See Sullivan*, 904 F.2d

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[10] The Supreme Court has acknowledged the complexity of alcoholism. In *Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), the Supreme Court sustained the validity of a Veterans Administration regulation which classified all forms of alcoholism as "willful misconduct", except for alcoholism that was "secondary to and a manifestation of an acquired psychiatric disorder." *Id.* at 538 n. 2, 550-52, 108 S.Ct. at 1376 n. 2, 1382-84. The Court noted that whether alcoholism "is a disease whose course its victims cannot control" is a "medical issue on which the authorities remain sharply divided." *Id.* at 552, 108 S.Ct. at 1383. *See generally*, Fingarett, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv.L.Rev. 793, 802-08 (1970) (discussing the controversy regarding the nature of alcoholism).

A survey of current literature also demonstrates the controversy regarding the nature of alcoholism and other forms

at 845. Exhaustion also permits the agency to compile a complete record and provides the agency with a full opportunity to exercise its judgment and exper-

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of substance addiction. *See, e.g.*, N. Heather & I. Robertson, *Problem Drinking* (2d ed. 1989) (discussing the various theories regarding alcoholism, and arguing that problem drinking is not a disease but rather a social psychological response to various environmental stimuli) ; J. Beasley, *Wrong Diagnosis, Wrong Treatment: The Plight of the Alcoholic in America* (1987) (arguing that alcoholism results from an inherited biochemical difference which should be treated by stabilizing an individual's nervous system through nutrition and exercise) ; *Constructive Drinking* (M. Douglas ed. 1987) (examining alcohol use from an anthropological perspective) ; *Psychological Theories of Drinking and Alcoholism* (H. Blane & K. Leonard ed. 1987) (detailing nine theories of alcoholism, including such theories as the social learning theory, the tension reduction theory, and the interactional theory).

Minnesota is a leader in chemical dependency treatment. As of 1989, Minnesota treatment programs were admitting 40,000 people per year. The Minnesota Consolidated Chemical Dependency Treatment Fund pays for treatment of 16,000 of these people, and is being viewed as a national model for publicly funded chemical dependency treatment. Chemical Dependency Program Division, Department of Human Services of the State of Minnesota, *Biennial Report* 46 (1989). Minnesota has also been a leader in curbing the spread of AIDS among intravenous drug abusers. *Id.* Minnesota state agencies currently spend a total of 63.5 million dollars a year on alcohol and drug related programs. *Id.*

In 1989, Minnesota conducted and funded a household survey of drug and alcohol use among adults (age 18 and over) living in Minnesota. The survey was designed to provide current information regarding the extent of substance use in Minnesota, how that use compares with national figures, and how use varies by region, sex, and race. Chemical Dependency Program Division, Minnesota Department of Human Services, *Minnesota Household Surveys of Drug and Alcohol Use Among Adults*, Report No. 1 (1989).

tise to evaluate such claims and correct any errors in the administrative process.[11] Therefore, the purposes underlying the exhaustion requirement will not be served if exhaustion is waived in the present case.

Based on the foregoing analysis, it is obvious that none of the unique circumstances which warranted the waiver of exhaustion in *City of New York* is present in this case. The plaintiffs do not challenge any secret policies which are inconsistent with published regulations. They also fail to prove that they would suffer irreparable harm if required to exhaust their administrative remedies. They raise claims which are not entirely collateral, but are inextricably intertwined with their claims for benefits. Finally, the policies which support the exhaustion requirement would be served if the plaintiffs were required to proceed to the third and fourth levels of the administrative process. The plaintiffs essentially claim that exhaustion of administrative remedies should be waived because if exhaustion were required, persons with possibly meritorious claims would be forced to pursue their administrative appeals, would obtain benefits, and would have no basis for complaint. This claim is insufficient to support the requested waiver and thus the court determines that the plaintiffs must exhaust their administrative remedies. As a result, there is no basis for jurisdiction pursuant to § 405(g).

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[11] Ironically, the plaintiffs claim that waiver of exhaustion is required in the present case because "they seek declaratory and injunctive relief requiring the defendants to develop the evidence of their impairments fully and adequately. . . ." Instead of supporting the requested waiver, this assertion provides further evidence that plaintiffs should be required to exhaust their administrative remedies to permit the agency to compile a complete record.

B. *Plaintiffs' Assertion That This Court Has Jurisdiction Pursuant to 28 U.S.C. § 1361*

Under 28 U.S.C. § 1361:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The plaintiffs claim that this section provides an alternative basis for jurisdiction over their claims. The Supreme Court, however, specifically rejected this argument in *Heckler v. Ringer*, 466 U.S. 602, 616-17, 104 S.Ct. 2013, 2022-23, 80 L.Ed.2d 622 (1984). In rejecting this alternative basis for jurisdiction, the Court noted that "[t]he common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Id.* at 616, 104 S.Ct. at 2022. (citations omitted). The Court then held that § 205(g) of the Social Security Act clearly provides claimants with an adequate remedy for challenging all aspects of the Secretary's denial of their claims, and thus, mandamus was not available as an alternative basis for jurisdiction. *Id.* at 617, 104 S.Ct. at 2022-23. Following *Ringer*, this court has no jurisdiction over plaintiffs' claims under § 1361.

C. *Plaintiffs' Claim That Federal Question Jurisdiction Provides an Alternative Basis for Jurisdiction*

The plaintiffs also claim that this court has jurisdiction over their constitutional claims against Sec-

retary Sullivan under 28 U.S.C. § 1331, which states that:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The plaintiffs further assert that this court has jurisdiction over their claims against the state officials, pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Under § 1343:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced against any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . .

The plaintiffs' attempt to maintain their suit on the basis of federal question jurisdiction, however, is barred by the provisions of the Social Security Act itself. As the Supreme Court noted in *Weinberger v. Salfi*, 42 U.S.C. § 405(h) expressly provides that:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [28 U.S.C. § 1331 *et seq.*] to recover on any claim arising under [Title II of the Social Security Act].

Weinberger v. Salfi, 422 U.S. at 756, 95 S.Ct. at 2462 (citing statute) (brackets in the original). The lan-

guage of § 405(h) indicates that this jurisdictional bar is more than a codified requirement of administrative exhaustion, because it "states that no action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Id.* at 757, 95 S.Ct. at 2463. The wording of § 405(h), thus "bars district court federal-question jurisdiction over suits, such as this one, which seek to recover Social Security benefits." *Id.* at 756-57, 95 S.Ct. at 2462-63. Following this analysis, this court has no federal question jurisdiction over the plaintiffs' claims.

CONCLUSION

Based on the foregoing analysis, this court has no federal question jurisdiction over the plaintiffs' claims. *Salfi*, 422 U.S. at 756-57, 95 S.Ct. at 2462-63. The court also has no jurisdiction pursuant to 28 U.S.C. § 1361 because no writ of mandamus could properly issue in this case. *Ringer*, 466 U.S. at 616, 104 S.Ct. at 2022. The court also determines that waiver of exhaustion is not appropriate, thus this court has no jurisdiction pursuant to 42 U.S.C. § 405(g). The court therefore grants the defendants' motion for summary judgment.

Based on the foregoing analysis, IT IS HEREBY ORDERED that:

1. Plantiffs' motion for class certification is denied as moot;
2. Defendants' motion for summary judgment is granted;
3. Defendants' motion to dismiss plaintiffs' claim for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted is denied as moot;

4. Defendants' appeal from the magistrate's order granting plaintiffs' motion to compel responses to certain deposition questions is denied as moot; and

5. Defendants Roers' and Samargia's appeal of the magistrate's order requiring R. Dougherty to answer certain deposition questions is denied as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1643MNMI

DANIEL J. SCHOOLCRAFT, APPELLANTS

vs.

LOUIS W. SULLIVAN, M.D., APPELLEE

ORDER DENYING PETITION FOR
REHEARING AND SUGGESTION
FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Beam, and Judge Loken would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

October 9, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

42 U.S.C. 405(b), (g), (h)

§ 405. Evidence, procedure, and certification for payments

* * * * *

(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The

Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

(2) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, window's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling, and

(C) as a consequence of the finding described in subparagraph (B), such individual is determined by the Secretary not to be entitled to such benefits.

any reconsideration of the finding described in subparagraph (B), in connection with a reconsideration by the Secretary (before any hearing under paragraph (1) on the issue of such entitlement) of his determination described in subparagraph (C), shall be made only after opportunity for an evidentiary hearing, with regard to the finding described in subparagraph (B), which is reasonably accessible to such individual. Any reconsideration of a finding described in subparagraph (B) may be made either by the State agency or the Secretary where the finding was originally made by the State agency, and shall be

made by the Secretary where the finding was originally made by the Secretary. In the case of a reconsideration by a State agency of a finding described in subparagraph (B) which was originally made by such State agency, the evidentiary hearing shall be held by an adjudicatory unit of the State agency other than the unit that made the finding described in subparagraph (B). In the case of a reconsideration by the Secretary of a finding described in subparagraph (B) which was originally made by the Secretary, the evidentiary hearing shall be held by a person other than the person or persons who made the finding described in subparagraph (B).

* * * * *

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court of the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the

Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstand-

ing any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision

The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

* * * * *

APPENDIX E

42 U.S.C. 421

§ 421. Disability determinations

(a) State agencies

(1) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall be made by a State agency, notwithstanding any other provision of law, in any State that notifies the Secretary in writing that it wishes to make such disability determinations commencing with such month as the Secretary and the State agree upon, but only if (A) the Secretary has not found, under subsection (b)(1) of this section, that the State agency has substantially failed to make disability determinations in accordance with the applicable provisions of this section or rules issued thereunder, and (B) the State has not notified the Secretary, under subsection (b)(2) of this section, that it does not wish to make such determinations. If the Secretary once makes the finding described in clause (A) of the preceding sentence, or the State gives the notice referred to in clause (B) of such sentence, the Secretary may thereafter determine whether (and, if so, beginning with which month and under what conditions) the State may again make disability determinations under this paragraph.

(2) The disability determinations described in paragraph (1) made by a State agency shall be made in accordance with the pertinent provisions of this subchapter and the standards and criteria contained in

regulations or other written guidelines of the Secretary pertaining to matters such as disability determinations, the class or classes of individuals with respect to which a State may make disability determinations (if it does not wish to do so with respect to all individuals in the State), and the conditions under which it may choose not to make all such determinations. In addition, the Secretary shall promulgate regulations specifying, in such detail as he deems appropriate, performance standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure effective and uniform administration of the disability insurance program throughout the United States. The regulations may, for example, specify matters such as—

(A) the administrative structure and the relationship between various units of the State agency responsible for disability determinations,

(B) the physical location of and relationship among agency staff units, and other individuals or organizations performing tasks for the State agency, and standards for the availability to applicants and beneficiaries of facilities for making disability determinations,

(C) State agency performance criteria, including the rate of accuracy of decisions, the time periods within which determinations must be made, the procedures for and the scope of review by the Secretary, and, as he finds appropriate, by the State, of its performance in individual cases and in classes of cases, and rules governing access of appropriate Federal officials to State offices and

to State records relating to its administration of the disability determination function,

(D) fiscal control procedures that the State agency may be required to adopt, and

(E) the submission of reports and other data, in such form and at such time as the Secretary may require, concerning the State agency's activities relating to the disability determination.

Nothing in this section shall be construed to authorize the Secretary to take any action except pursuant to law or to regulations promulgated pursuant to law.

(b) Determinations by Secretary

(1) If the Secretary finds, after notice and opportunity for a hearing, that a State agency is substantially failing to make disability determinations in a manner consistent with his regulations and other written guidelines, the Secretary shall, not earlier than 180 days following his finding, and after he has complied with the requirements of paragraph (3), make the disability determinations referred to in subsection (a)(1) of this section.

(2) If a State, having notified the Secretary of its intent to make disability determinations under subsection (a)(1) of this section, no longer wishes to make such determinations, it shall notify the Secretary in writing of that fact, and, if an agency of the State is making disability determinations at the time such notice is given, it shall continue to do so for not less than 180 days, or (if later) until the Secretary has complied with the requirements of paragraph (3). Thereafter, the Secretary shall make the disability determinations referred to in subsection (a)(1) of this section.

(3)(A) The Secretary shall develop and initiate all appropriate procedures to implement a plan with respect to any partial or complete assumption by the Secretary of the disability determination function from a State agency, as provided in this section, under which employees of the affected State agency who are capable of performing duties in the disability determination process for the Secretary shall, notwithstanding any other provision of law, have a preference over any other individual in filling an appropriate employment position with the Secretary (subject to any system established by the Secretary for determining hiring priority among such employees of the State agency) unless any such employee is the administrator, the deputy administrator, or assistant administrator (or his equivalent) of the State agency, in which case the Secretary may accord such priority to such employee.

(B) The Secretary shall not make such assumption of the disability determination function until such time as the Secretary of Labor determines that, with respect to employees of such State agency who will be displaced from their employment on account of such assumption by the Secretary and who will not be hired by the Secretary to perform duties in the disability determination process, the State has made fair and equitable arrangements to protect the interests of employees so displaced. Such protective arrangements shall include only those provisions which are provided under all applicable Federal, State and local statutes including, but not limited to, (i) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective-bargaining agreements; (ii) the continuation of collective-bargaining rights; (iii) the assignment of

affected employees to other jobs or to retraining programs; (iv) the protection of individual employees against a worsening of their positions with respect to their employment; (v) the protection of health benefits and other fringe benefits; and (vi) the provision of severance pay, as may be necessary.

(c) Review of determination by Secretary

(1) The Secretary may on his own motion or as required under paragraphs (2) and (3) review a determination, made by a State agency under this section, that an individual is or is not under a disability (as defined in section 416(i) or 423(d) of this title) and, as a result of such review, may modify such agency's determination and determine that such individual either is or is not under a disability (as so defined) or that such individual's disability began on a day earlier or later than that determined by such agency, or that such disability ceased on a day earlier or later than that determined by such agency. A review by the Secretary on his own motion of a State agency determination under this paragraph may be made before or after any action is taken to implement such determination.

(2) The Secretary (in accordance with paragraph (3)) shall review determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title). Any review by the Secretary of a State agency determination under this paragraph shall be made before any action is taken to implement such determination.

(3)(A) In carrying out the provisions of paragraph (2) with respect to the review of determina-

tions made by State agencies pursuant to this section that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title), the Secretary shall review—

(i) at least 50 percent of all such determinations made by State agencies on applications for benefits under this subchapter, and

(ii) other determinations made by State agencies pursuant to this section to the extent necessary to assure a high level of accuracy in such other determinations.

(B) In conducting reviews pursuant to subparagraph (A), the Secretary shall, to the extent feasible, select for review those determinations which the Secretary identifies as being the most likely to be incorrect.

(C) Not later than April 1, 1992, and annually thereafter, the Secretary shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a written report setting forth the number of reviews conducted under subparagraph (A)(ii) during the preceding fiscal year and the findings of the Secretary based on such reviews of the accuracy of the determinations made by State agencies pursuant to this section.

(d) Hearings and judicial review

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary,

and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(e) State's right to cost from Trust Funds

Each State which is making disability determinations under subsection (a)(1) of this section shall be entitled to receive from the Trust Funds, in advance or by way of reimbursement, as determined by the Secretary, the cost to the State of making disability determinations under subsection (a)(1) of this section. The Secretary shall from time to time certify such amount as is necessary for this purpose to the Managing Trustee, reduced or increased, as the case may be, by any sum (for which adjustment hereunder has not previously been made) by which the amount certified for any prior period was greater or less than the amount which should have been paid to the State under this subsection for such period; and the Managing Trustee, prior to audit or settlement by the General Accounting Office, shall make payment from the Trust Funds at the time or times fixed by the Secretary, in accordance with such certification. Appropriate adjustments between the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund with respect to the payments made under this subsection shall be made in accordance with paragraph (1) of subsection (g) of section 401 of this title (but taking into account any refunds under subsection (f) of this section) to insure that the Federal Disability Insurance Trust Fund is charged with all expenses incurred which are attributable to the administration of section 423 of this title and the Federal Old-Age and Survivors Insurance Trust Fund is charged with all other expenses.

(f) Use of funds

All money paid to a State under this section shall be used solely for the purposes for which it is paid; and any money so paid which is not used for such purposes shall be returned to the Treasury of the United States for deposit in the Trust Funds.

(g) Regulations governing determinations in certain cases

In the case of individuals in a State which does not undertake to perform disability determinations under subsection (a)(1) of this section, or which has been found by the Secretary to have substantially failed to make disability determinations in a manner consistent with his regulations and guidelines, in the case of individuals outside the United States, and in the case of any class or classes of individuals for whom no State undertakes to make disability determinations, the determinations referred to in subsection (a) of this section shall be made by the Secretary in accordance with regulations prescribed by him.

(h) Evaluations of mental impairments by qualified medical professionals

An initial determination under subsection (a), (c), (g), or (i) of this section that an individual is not under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment.

(i) Review of disability cases to determine continuing eligibility; permanent disability cases; appropriate number of cases reviewed; reporting requirements

(1) In any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Secretary (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years, subject to paragraph (2); except that where a finding has been made that such disability is permanent, such reviews shall be made at such times as the Secretary determines to be appropriate. Reviews of cases under the preceding sentence shall be in addition to, and shall not be considered as a substitute for, any other reviews which are required or provided for under or in the administration of this subchapter.

(2) The requirement of paragraph (1) that cases be reviewed at least every 3 years shall not apply to the extent that the Secretary determines, on a State-by-State basis, that such requirement should be waived to insure that only the appropriate number of such cases are reviewed. The Secretary shall determine the appropriate number of cases to be reviewed in each State after consultation with the State agency performing such reviews, based upon the backlog of pending reviews, the projected number of new applications for disability insurance benefits, and the current and projected staffing levels of the State agency, but the Secretary shall provide for a waiver of such requirement only in the case of a State which makes a good faith effort to meet proper staffing requirements for the State agency and to process case reviews in a timely fashion. The Secretary shall report annually to the Committee on Finance of the Senate and the

Committee on Ways and Means of the House of Representatives with respect to the determinations made by the Secretary under the preceding sentence.

(3) The Secretary shall report annually to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives with respect to the number of reviews of continuing disability carried out under paragraph (1), the number of such reviews which result in an initial termination of benefits, the number of requests for reconsideration of such initial termination or for a hearing with respect to such termination under subsection (d) of this section, or both, and the number of such initial terminations which are overturned as the result of a reconsideration or hearing.

(4) In any case in which the Secretary initiates a review under this subsection of the case of an individual who has been determined to be under a disability, the Secretary shall notify such individual of the nature of the review to be carried out, the possibility that such review could result in the termination of benefits, and the right of the individual to provide medical evidence with respect to such review.

(j) Rules and regulations; consultative examinations

The Secretary shall prescribe regulations which set forth, in detail—

(1) the standards to be utilized by State disability determination services and Federal personnel in determining when a consultative examination should be obtained in connection with disability determinations;

(2) standards for the type of referral to be made; and

(3) procedures by which the Secretary will monitor both the referral processes used and the product of professionals to whom cases are referred.

Nothing in this subsection shall be construed to preclude the issuance, in accordance with section 553 (b) (A) of title 5, of interpretive rules, general statements of policy, and rules of agency organization relating to consultative examinations if such rules and statements are consistent with such regulations.

(k) Establishment of uniform standards for determination of disability

(1) The Secretary shall establish by regulation uniform standards which shall be applied at all levels of determination, review, and adjudication in determining whether individuals are under disabilities as defined in section 416(i) or 423(d) of this title.

(2) Regulations promulgated under paragraph (1) shall be subject to the rulemaking procedures established under section 553 of title 5.

APPENDIX F

42 U.S.C. 423(d)(1)(A)

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

APPENDIX G

42 U.S.C. 1382c(a)(3)(A)

§ 1382c. Definitions

* * * * *

(a)(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

* * * * *

APPENDIX H

42 U.S.C. 1383(c)(1), (3)

(c) Hearing to determine eligibility or amount of benefits; time within which to request hearing; time for determinations of Secretary pursuant to hearing; judicial review

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths

and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

* * * * *

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

APPENDIX I

42 U.S.C. 1383b(a)

§ 1383b. Administration

(a) Authority of Secretary

Subject to subsection (b) of this section, the Secretary may make such administrative and other arrangements (including arrangements for the determination of blindness and disability under section 1382c(a)(2) and (3) of this title in the same manner and subject to the same conditions as provided with respect to disability determinations under section 421 of this title) as may be necessary or appropriate to carry out his functions under this subchapter.

* * * * *

APPENDIX J

42 U.S.C. 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX K

28 U.S.C. 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX L

28 U.S.C. 1343(a)(3)

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * * * *

APPENDIX M

28 U.S.C. 1361

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

APPENDIX N

20 C.F.R. 404.1503

DETERMINATIONS

§ 404.1503 Who makes disability and blindness determinations.

(a) *State agencies.* State agencies make disability and blindness determinations for the Secretary for most persons living in the State. State agencies make these disability and blindness determinations under regulations containing performance standards and other administrative requirements relating to the disability and blindness determination function. States have the option of turning the function over to the Federal Government if they no longer want to make disability determinations. Also, the Secretary may take the function away from any State which has substantially failed to make disability and blindness determinations in accordance with these regulations. Subpart Q of this part contains the rules the States must follow in making disability and blindness determinations.

(b) *Social Security Administration.* The Social Security Administration will make disability and blindness determinations for the Secretary for—

(1) Any person living in a State which is not making for the Secretary any disability and blindness determinations or which is not making those determinations for the class of claimants to which that person belongs; and

(2) Any person living outside the United States.

(c) *What determinations are authorized.* The Secretary has authorized the State agencies and the Social

Security Administration to make determinations about—

(1) Whether you are disabled or blind;

(2) The date your disability or blindness began; and

(3) The date your disability or blindness stopped.

(d) *Review of State Agency determinations.* On review of a State agency determination or redetermination of disability or blindness we may find that—

(1) You are, or are not, disabled or blind, regardless of what the State agency found;

(2) Your disability or blindness began earlier or later than the date found by the State agency; and

(3) Your disability or blindness stopped earlier or later than the date found by the State agency.

(e) *Initial determinations for mental impairments.* An initial determination by a State agency or the Social Security Administration that you are not disabled (or a Social Security Administration review of a State agency's initial determination), in any case where there is evidence which indicates the existence of a mental impairment, will be made only after every reasonable effort has been made to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment. (See § 404.1616 for the qualifications we consider necessary for a psychologist to be a psychological consultant and § 404.1617 for what we consider *reasonable effort.*) If the services of qualified psychiatrists or psychologists cannot be obtained because of impediments at the State level, the Secretary may contract directly for the services. In a case where there is evidence of mental and nonmental impairments and a qualified

psychologist serves as a psychological consultant, the psychologist will evaluate only the mental impairment, and a physician will evaluate the nonmental impairment. The overall determination of impairment severity in combined mental and nonmental impairment cases will be made by a medical consultant and not a psychological consultant unless the mental impairment alone would justify a finding of disability.

APPENDIX O

20 C.F.R. 404.1520

EVALUATION OF DISABILITY

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for a period of disability and/or disability insurance benefits or for child's benefits based on disability, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments. Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found entitled to disability benefits, we follow a somewhat different order of evaluation to determine whether your entitlement continues, as explained in § 404.1594(f)(6).

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless

of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairments(s)* [sic] *must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where

you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

APPENDIX P

20 C.F.R. 404.1613(a)

§ 404.1613 Disability determinations the State makes.

(a) *General rule.* A State agency will make determinations of disability with respect to all persons in the State except those individuals whose cases are in a class specifically excluded by our written guidelines. A determination of disability made by the State is the determination of the Secretary, except as described in § 404.1503(d)(1).

* * * * *

APPENDIX Q

20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 12.09

12.09 *Substance Addiction Disorders*: Behavioral changes or physical changes associated with the regular use of substances that affect the central nervous system.

The required level of severity for these disorders is met when the requirements in any of the following (A through I) are satisfied.

A. Organic mental disorders. Evaluate under 12.02.

B. Depressive syndrome. Evaluate under 12.04.

C. Anxiety disorders. Evaluate under 12.06.

D. Personality disorders. Evaluate under 12.08.

E. Peripheral neuropathies. Evaluate under 11.14.

F. Liver damage. Evaluate under 5.05.

G. Gastritis. Evaluate under 5.04.

H. Pancreatitis. Evaluate under 5.08.

I. Seizures. Evaluate under 11.02 or 11.03.

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Nos. 92-1392 and 92-1395

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

DANIEL J. SCHOOLCRAFT, ET AL.

WALTER ROERS, DIRECTOR OF MINNESOTA DISABILITY DETERMINATION SERVICES, ET AL., PETITIONERS

v.

DANIEL J. SCHOOLCRAFT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT MOTION TO GRANT THE PETITIONS FOR A WRIT OF CERTIORARI, VACATE THE JUDGMENT OF THE COURT OF APPEALS, AND REMAND WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE DISTRICT COURT AND TO REMAND THE CASE TO THE DISTRICT COURT FOR CONSIDERATION OF THE PARTIES' SETTLEMENT AGREEMENT

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On November 1, 1993, the parties jointly moved this Court to defer consideration of the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this

case until January 7, 1994. In that motion, the parties explained that they were engaged in negotiations to settle this action, that they hoped to conclude a settlement agreement within 60 days, and that the proposed agreement then under discussion would provide for a joint proposal for the disposition of the certiorari petitions. This Court granted the motion on November 8, 1993. 114 S. Ct. 434.* The parties have now arrived at the anticipated settlement, which is set forth in the stipulation and attachments thereto. We have lodged 10 copies of the stipulation and attachments with the Clerk of this Court. By this present motion, the parties jointly move the Court to grant the petitions for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals with directions to vacate the judgment of the district court and to remand the case to the district court for consideration of the settlement.

1. In this putative class action, respondents challenge the manner in which the Minnesota Disability Determination Services (DDS), on behalf of the Secretary of Health and Human Services, evaluates claims for disability benefits under Title II and Title XVI of the Social Security Act based in whole or in part on allegations of alcoholism or drug addiction. The Eighth Circuit relied on *Bowen* v. *City of New York*, 476 U.S. 467 (1986), to hold that respondents were not required to exhaust their administrative remedies before obtaining judicial review in an action

* Previously, on October 4, 1993, this Court had granted a prior motion by the parties to defer consideration of the certiorari petitions until November 5, 1993. See 114 S. Ct. 48, 49.

against the Secretary under 42 U.S.C. 405(g). The Eighth Circuit further held that 42 U.S.C. 1983 provides respondents with a separate cause of action directly against the heads of Minnesota DDS and its parent agency. In separate petitions filed on or about February 22, 1993, the Secretary and the state petitioners sought review of both holdings.

2. The parties have now entered into an agreement to settle this case. Briefly, the agreement provides for: (1) the issuance by the Secretary of a circular to Minnesota DDS to clarify the method for evaluation of claims for disability benefits under Title II or Title XVI of the Social Security Act based in whole or in part on allegations of substance addiction disorders; (2) review by Minnesota DDS, under the circular, of prior initial and reconsideration determinations denying or terminating disability benefits based on allegations of substance addiction disorders, but only for individuals who, within a one-year period, file new claims for benefits based on a substance addiction disorder and are found disabled; and (3) poster notice of the availability of the review. The agreement also provides for the submission of this joint motion by the parties. The agreement further provides that, if this Court grants the instant motion, the parties will, following remand of the case to the district court, jointly submit the agreement to the district court and move for entry of a judgment dismissing the action in accordance with the agreement. The agreement is conditioned upon vacatur of the decisions of the court of appeals (971 F.2d 81) and the district court (753 F. Supp. 1478).

3. The disposition of the pending certiorari petitions proposed by this joint motion is consistent with

this Court's disposition of similar motions under similar circumstances. See *Continental Casualty Co.* v. *Fibreboard Corp.*, 113 S. Ct. 399 (1992); *City Gas Co.* v. *Consolidated Gas Co.*, 111 S. Ct. 1300 (1991); *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam); *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115 (1959) (per curiam); *Black* v. *Amen*, 355 U.S. 600 (1958) (per curiam).

4. If this Court denies this motion, petitioners urge the Court to grant the petitions for a writ of certiorari for the reasons stated in the petitions, and respondents urge the Court to deny the petitions for the reasons stated in the brief in opposition they filed on July 15, 1993.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES
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DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

WALTER ROERS, in his official capacity as Director of the Disability Determination Services; R. JANE BROWN, in her official capacity as Commissioner of the Minnesota Department of Jobs and Training, PETITIONERS,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 1983 authorizes respondents to sue officials of a state agency, created pursuant to state law, who make initial and reconsideration decisions on claims for Social Security disability benefits, for violations of federal law and the United States Constitution.

2. Whether, even if respondents could not proceed under 42 U.S.C. § 1983, the federal district court nevertheless had jurisdiction to consider respondents' claims against the state agency officials.

3. Whether the court of appeals was correct in waiving exhaustion of administrative remedies for a class of Social Security disability claimants, where, absent waiver, the challenged practices would never be subject to judicial scrutiny, where requiring exhaustion would cause irreparable harm, and where respondents' claims were collateral to their claims for disability benefits.

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42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 11

20 C.F.R. Pt. 404, subpt. P, App. 1, Listing 12.09 ..... 6, 7

20 C.F.R. Pt. 404, Subp. P, App. 1, Listing 112.09 6

20 C.F.R. § 404.1613(a) 10

20 C.F.R. § 404.1615(g) 12

20 C.F.R. § 416.1013(a) 10

20 C.F.R. § 416.1015(g) 12

56 Fed. Reg. 33,130 (July 18, 1991) 6

Minn. Stat. § 268A.03(d) 14, 15

Miscellaneous

Staff of House Comm. on Ways & Means, 102d Cong., 2d Sess., Overview of Entitlement Programs 61 (Comm. Print 1992) 4, 23, 26

Nos. 92-1392 and 92-1395

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

WALTER ROERS, in his official capacity as Director of the Disability Determination Services; R. JANE BROWN, in her official capacity as Commissioner of the Minnesota Department of Jobs and Training, PETITIONERS,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petitions for writs of certiorari submitted on behalf of the Secretary of Health and Human Services (Secretary) and the state agency officials.

JURISDICTION

The Secretary and the state petitioners each filed applications for an extension of time to file their petitions for a writ of certiorari. Justice Blackmun granted those applications in two separate orders, extending the time to February 8, 1993.

The Solicitor General, "on behalf of the Secretary," filed a second application for an extension of time to file her petition. Application at 1 (January 1993). On February 1, 1993, Justice Blackmun granted the Secretary's application, extending the time for the Secretary to file her petition to February 22, 1993. The Secretary's petition was subsequently filed timely.

The state petitioners, unlike the Secretary, never filed an application for an extension beyond February 8, 1993, although the Secretary's application notes that: "The Attorney General of Minnesota joins in this [the Secretary's] application." *Id.* (emphasis added). In any event, Justice Blackmun's February 1, 1993 order, by its terms, extended only the Secretary's time to file.

The state petitioners took no further action to obtain an extension beyond February 8, 1993. Their petition, which was filed on February 22, 1993, was untimely and should be dismissed on this ground alone. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

STATEMENT

Respondents brought this class action for declaratory and injunctive relief on behalf of applicants and recipients for Social Security disability benefits and Supplemental Security Income, who allege that they are unable to work in whole or in part because of alcoholism or some other drug dependency, and whose claims had been denied at the initial

or reconsideration level of the administrative appeal process. C.A. App. 13.[1] They alleged that the standard used by the state Disability Determination Service (DDS) to evaluate their claims differed from the standard used by the Secretary's Administrative Law Judges (ALJs), and was inconsistent with the Social Security Act as it had been interpreted by the Eighth Circuit in *Adams v. Weinberger*, 548 F.2d 239 (8th Cir. 1977). C.A. App. 21. They also claimed that the state agency failed to gather and develop evidence fully as required by the Act. *Id.* Finally, they asserted that the Secretary's policies and procedures violated their rights to equal protection and due process guaranteed by the United States Constitution. *Id.* at 21-22.

When respondents filed their complaint in January, 1990, they sued only the Secretary of Health and Human Services; they did not assert any claims against the state agency officials. *Id.* at 11. The evidence then available to respondents suggested that the challenged policies were attributable to the Secretary. The Secretary, for example, had advised the ALJs in her Office of Hearings and Appeals of the Eighth Circuit's decisions governing the evaluation of alcoholism, but had never similarly advised state agency employees.[2] Subsequent discovery suggested, however, that some of the systemic problems relating to the gathering and development of evidence were attributable to the state agency.

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[1]C.A. App. refers to the Joint Appendix filed in the court of appeals. C.A. Supp. App. refers to the Supplemental Appendix attached to respondent Schoolcraft's Eighth Circuit brief.

[2] The official manual used by the Office of Hearings and Appeals advised ALJs in Minnesota about significant 8th Circuit case law. C.A. Supp. App. 14-16. In stark contrast, supervisory employees at DDS testified that they had not been aware of the *Adams* decision, and had not been instructed by SSA that, in evaluating a claim of disability on the basis of substance abuse, they must determine whether a claimant can voluntarily control his use of the substance as required by *Adams*. C.A. App. 360-63, 367-71.

Since the district court had ordered that all amendments be filed before April 1, 1990, respondents amended their complaint to assert a claim against state agency officials. Docket No. 15, C.A. App. 4; C.A. App. 88.

Although the petitioners describe the multi-level administrative review procedures in some detail, they omit two important points. First, two-thirds of all disability claimants do not appeal beyond the initial and reconsideration decisions made by the state DDS officials. Staff of House Comm. on Ways & Means, 102d Cong., 2d Sess., Overview of Entitlement Programs 61 (Comm. Print 1992) (hereafter 1992 Green Book). Second, disability claimants must wait an average of 14 months for an ALJ decision. C.A. App. 331, 259-262. Thus, even those claimants who do appeal are seriously harmed by erroneous state agency decisions.

The petitioners misrepresent respondents' position in two ways. First, with respect to the underlying claim, respondents do not allege that "a claimant must be conclusively deemed disabled once it is determined that he or she 'is addicted and has lost the ability to voluntarily control the use of alcohol/drugs.'" Secretary's Petition for a Writ of Certiorari (hereafter Sec. Pet.) at 9. Respondents have clearly acknowledged that the Social Security Act requires "a causal relationship between an impairment and the inability to work." Appellants' C.A. Brief at 7. Respondents claim that a claimant is eligible for disability benefits if he or she is addicted, has lost the ability to voluntarily control the use of alcohol, and as a result, is unable to work.

Second, the Secretary continues to argue that "[r]espondents asserted that the errors allegedly made by Minnesota DDS were being corrected by ALJs." Sec. Pet. at 21. This is patently false. Respondents repeatedly argued the contrary in both the district court

and the court of appeals. "[A]lthough exhaustion of administrative remedies will often result in the award of benefits [to class members], it never removes or corrects the systemic errors at the initial and reconsideration stage of the administrative process." Appellants' C.A. Brief at 31; Appellants' Response to Petitions for Rehearing at 8. ALJs decide whether a particular claimant is disabled; they do not, however, consider or address the validity of the practices and procedures used by the state DDS officials.

The experience of Joseph Drumbeater, a named plaintiff, is illustrative. Mr. Drumbeater had applied for SSI on November 29, 1988. His application was denied in an initial decision on February 28, 1989, and in a reconsideration decision on June 23, 1989. In making these decisions, DDS failed to gather Mr. Drumbeater's treatment records, and failed to apply the standard set forth in *Adams v. Weinberger*, *supra*. C.A. App. 68-74. Mr. Drumbeater filed a timely request for an ALJ hearing, and received a favorable decision on March 12, 1990, sixteen months after he applied.[3] *Id.* at 345-352. The ALJ first concluded that Mr. Drumbeater's alcohol dependence did not meet the requirements of Listing 12.09. *Id.* at 349; *see infra* p. 6. The ALJ, applying the standard set forth by the Eighth Circuit in *Adams v. Weinberger*, 548 F.2d 239 (8th Cir. 1977), then concluded that Mr. Drumbeater was disabled. C.A. App. at 349-50.

The sole issue in Mr. Drumbeater's appeal was whether he was eligible for disability benefits under the Social Security Act. The ALJ had no authority to consider or rule on the practices and procedures employed by the state DDS office at the initial and

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[3]By the time the appeal in this case was heard by the Court of Appeals, all three named plaintiffs had been found disabled and eligible for benefits. The Secretary moved to dismiss the appeal as moot. The Court of Appeals denied the motion, and the Solicitor General has abandoned that argument here.

reconsideration levels. The ALJ did not consider either whether DDS had adequately gathered and developed the record or whether DDS had applied the proper standards when evaluating Mr. Drumbeater's disability.

Moreover, the ALJ hearing did not provide any means for preventing a recurrence of the irreparable harm Mr. Drumbeater suffered while waiting for his hearing. When DDS employees review his continuing eligibility, they will once again apply the very practices and procedures that respondents challenge in this litigation.

Finally, the petitioners fail to mention that, while the appeal was pending in the Eighth Circuit, the Secretary published proposed amendments to the adult mental impairment regulations. 56 Fed. Reg. 33,130 (July 18, 1991). The listing for substance addiction disorders is currently a "reference" listing. 20 C.F.R. Pt. 404, subpt. P, App. 1, Listing 12.09. Instead of identifying clinical signs and symptoms of a substance addiction disorder, it refers to other mental impairments that are to be used to determine whether a claimant who suffers from a substance addiction is eligible for disability benefits.

The proposed Listing 12.09, renamed "substance dependence disorders," is no longer a reference listing. Rather, for the first time, it lists the signs and symptoms which substantiate the presence of a disabling substance dependence disorder. 56 Fed. Reg. at 33,142. When the new Listing 12.09 is adopted, there will at long last be a specific regulation that establishes a framework for finding a claimant disabled based upon alcoholism alone.[4]

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[4]The Secretary has already published a new listing for substance dependence disorders in children which parallels proposed Listing 12.09. 20 C.F.R. Pt. 404, Subp. P, App. 1, Listing 112.09 (1992).

In addition to creating a separate listing for substance dependence disorders, the new listing will require consideration of the ability to control the use of alcohol or other substance, as required by *Adams*. One of the listed signs of a substance dependence disorder in the proposed regulation is: "Two or more unsuccessful efforts to cut down or control use." *Id.* (to be codified at 20 C.F.R. Part 404, subpt. P, App. 1, Listing 12.09). The promulgation of this proposed rule in final form, together with other changes in policy that have taken place during the pendency of this litigation, will go a long way toward resolving the underlying claims.

In a similar vein, the court of appeals noted that, in oral argument, the government had claimed that the Secretary currently complies with the legal standards and procedures respondents deem to be applicable. Sec. App. 18a.[5] The Court then stated: "[T]he Secretary can easily remedy this dispute and save everyone a great deal of time and expense by entering into a consent judgment in the district court specifically stating the applicable standards are to be applied to each stage of the claim evaluation process." *Id.*

REASONS FOR DENYING THE WRIT

I. Introduction

The decision of the court of appeals is in most respects fully consistent with all of the other circuits and, in all respects, fully consistent with decisions of this Court. Only with respect to one narrow issue does the decision below vary from any other circuit, namely, whether state agency officials who make disability determinations act under color of state law for the purposes of 42 U.S.C. § 1983. The petitioners attempt to magnify this narrow

[5]"Sec. App." refers to the Secretary's Appendix to her Petition for a Writ of Certiorari.

issue into one of major proportions and dire consequences for the entire Social Security system, in the hopes of convincing this Court to grant review and, in essence, overrule *Bowen v. City of New York*, 476 U.S. 467 (1986). As we show more fully below, whether or not the state agency officials act under color of state law, respondents have stated valid claims against the state petitioners over which the district court had jurisdiction. Even if the question relating to section 1983 were of greater significance, the current posture of this case makes it inappropriate for review. Rather, the Court should permit the case to be remanded to the district court for completion of discovery and trial, or, as we have indicated, a likely early settlement.

Whether or not the Court grants the petitions for certiorari with respect to the section 1983 question, the Court should deny review with respect to waiver of exhaustion of administrative remedies under 42 U.S.C. § 405(g). The Secretary concedes that there is no split in the circuits as to this question. To the contrary, the appellate courts have applied this Court's unanimous decision in *City of New York* without difficulty or disagreement. The Secretary's contention that the Eighth Circuit's decision is contrary to *City of New York* is wholly without merit.

II. The Petitions Should be Denied as to the Section 1983 Questions.

A. The Color of State Law Issue Does Not Warrant Review.

The Eighth Circuit recognized that respondents had stated a claim against the state petitioners under 42 U.S.C. § 1983. "Claimants allege that these state officers in their official capacities, acting under color of state law, violated federal law and the United States Constitution by failing to apply the proper criteria." Sec. App. 17a. On the basis of this allegation, the court concluded that there was federal question jurisdiction to consider these

claims. *Id.* In reaching this conclusion, the court rejected the state petitioners' argument that 42 U.S.C. § 405(h) bars federal question jurisdiction over them. *Id.* at 16a. The Court noted that section 405(h) applies only to officers and employees of the federal government, and held that the state officials were neither. *Id.* at 17a. In a footnote to this last holding, the Eighth Circuit stated that "we disagree with the holding of the Second Circuit that the state defendants are acting solely as agents of the United States. *See Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981)." *Id.*

In *Ellis v. Blum*, *supra*, the Second Circuit, like the Eighth Circuit here, was reviewing a dismissal for lack of jurisdiction. Although analyzing the issue differently, the Second Circuit agreed with the Eighth Circuit that section 405(h) did not preclude federal question jurisdiction over the plaintiffs' claims. Based upon the record before it, however, the court concluded that the state officials were acting under color of federal law and therefore could not be sued under section 1983.

For the following reasons, this Court should not grant the petitions for certiorari to resolve this minor disagreement between the circuits.

1. If the state petitioners do not act under color of state law, respondents can proceed with their claims against them under 42 U.S.C. §405(g). The petitioners each emphasize the close relationship between the Secretary and the state agency. Although neither expressly claims that there is an agency relationship, the state petitioner argues that "there is a seamless integration of the DDS into the benefit adjudication process under the Act with truly plenary control of the DDS by the SSA." State's Pet. at 13. The Secretary argues that the state officials "act on behalf of the Secretary and therefore stand in the shoes of her officers or employees . . . ." Sec. Pet. at 21 (citing *Ellis v. Blum)*. Both petitioners

rely on the federal regulations which provide that a decision of the state agency at the initial and reconsideration levels is the determination of the Secretary. 20 C.F.R. §§ 404.1613(a), 416.1013(a). Under the petitioners' reasoning, respondents could bring their claims against the state agency officials pursuant to 42 U.S.C. §405(g).[6]

Furthermore, the supplemental jurisdiction statute now provides an alternative basis for bringing claims against the state DDS agency as a pendent party in federal court. 28 U.S.C. § 1367(a) (effective Dec. 1, 1990). Social Security claimants can bring a state law claim that DDS is violating federal law as part of a related action in federal court against the Secretary under section 405(g). *See*, e.g., *H. Christiansen & Sons v. City of Duluth*, 225 Minn. 475, 483-84 (1948) (recognizing a state law cause of action for violations of a federal statute); *see also Kuehner v. Schweiker*, 717 F.2d 813, 828 n.17 (3d Cir. 1983) (Becker, J. concurring), *vacated and remanded on other grounds*, 469 U.S. 977 (1984). Given these alternative bases of jurisdiction, the petitioners' claims of the disastrous consequences to the Social Security system unless this Court issues a writ of certiorari simply have no merit.

The insignificance of the state action issue in this context is further demonstrated by the fact that both the Second Circuit in *Ellis* and the Third Circuit in *Kuehner v. Schweiker*, *supra*, found that there was indeed federal question jurisdiction under 28 U.S.C. § 1331 over the Social Security claimants' causes of action against the state agency officials.[7] Thus, the bottom line reached by the Eighth Circuit, namely, that Social Security

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[6]The requirement of a "final" decision would be waived for the same reasons it was waived by the Eighth Circuit as to respondents' claims against the Secretary. *See infra* Part IV, pp. 22-28.

[7]The Second Circuit found 1331 jurisdiction because the claims against the state agency were separate and distinct from the claims against the Secretary. *Ellis*, 643 F.2d at 76. In (continued...)

claimants could bring a cause of action against state agency officials challenging the procedures that they use to evaluate claims of disability, is fully consistent with the result reached by all of the circuits that have considered the issue. The Social Security disability system remains fully operational, despite the fact that state agency officials have been and continue to be subject to suit.

2. Since respondents can proceed with their claims against the state petitioners even if they did not act under color of state law, whether this case is "cert. worthy" depends in part on the differences between bringing the claims against the state petitioners under section 1983 and section 405(g). There are two differences: the first relates to attorney's fees, and the second to the doctrine of exhaustion of administrative remedies. As we show below, neither is significant.

In any action brought pursuant to 42 U.S.C. § 1983, a prevailing plaintiff has a claim for attorney's fees under 42 U.S.C. § 1988. Section 1988 attorney's fees are generally awarded to prevailing plaintiffs, unless "special circumstances would render the award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)). Whether or not fees would ultimately be awarded against the state agency is a matter of pure speculation. If after a decision on the merits, it is determined that the state agency was merely complying with the Secretary's instructions, the state agency could argue that fees under section 1988 should be denied because the state

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[7](...continued)
Kuehner, the Third Circuit found 1331 jurisdiction over the claim that the state agency, consistent with the Secretary's instructions, was violating the Social Security Act. 717 F.2d 813, 816-17 (3d Cir. 1983), *vacated and remanded on other grounds*, 469 U.S. 977 (1984). Here, discovery is likely to establish that some of the claims against the state agency are distinct from the claims against the Secretary.

was free of any culpability. *See, e.g., Council for Periodical Distributors Ass'ns v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987); *Jose P. v. Ambach*, 669 F.2d 865, 871 (2nd Cir. 1982). The court might well hold the Secretary, rather than the state agency, liable for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Even if fees were awarded against the state agency, they would likely be reimbursed by the Secretary.[8] *See* 42 U.S.C. § 421(e); 20 C.F.R. §§ 404.1615(g), 416.1015(g). Given the wholly speculative nature of the attorney's fees question, the possibility that some day, in some case, some court might grant attorney's fees against a state DDS office does not justify review of the state action issue by this Court in this case.

The second difference between bringing a claim against the state agency under section 405(g) and section 1983 is that section 405(g) contains a statutory, although waivable, requirement of exhaustion of administrative remedies, while under section 1983, exhaustion is not required. *Patsy v. Bd. of Regents of State of Florida*, 457 U.S. 496 (1982). In cases like the instant case where the claim involves the practices and procedures used by the state DDS office at the initial and reconsideration levels only, and is collateral to any claim for benefits, exhaustion is not required under section 405(g). *See infra* Part IV pp. 22-28. Thus, whether the state DDS officials act under color of state law and are sued under section 1983, or whether they are sued under section 405(g), exhaustion of administrative remedies would not be required.

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[8]In *Boring v. Sullivan*, No 2:91-0429 (S.D.W.Va.), for example, a class of Social Security claimants challenged the failure of the state DDS office to assure that evaluations of residual functional capacity are performed by a physician, as required by federal regulations. After the district court denied the defendants' motions to dismiss, the parties stipulated to a settlement on the merits. Subsequently, the parties agreed to an amount of attorneys' fees, all of which were paid by the federal government.

The conclusion that state DDS officials act under color of state law under section 1983 would not open the floodgates to thousands of lawsuits by unhappy Social Security claimants. Where a claimant alleges only that the state agency's decision denying benefits was inconsistent with federal law, and that the decision should be reversed, a section 1983 action would be foreclosed on the ground that the Social Security Act provides the exclusive basis for review of the decision to deny benefits. *See Smith v. Robinson*, 468 U.S. 992 (1988).

The Secretary argues that allowing section 1983 actions against a state DDS office could disrupt the administration of the disability programs in two ways. Sec. Pet. at 17-18. Both are contrived. First, she argues that exposing state officials to lawsuits could discourage states from participating in the Social Security programs, irrespective of the potential liability for attorney's fees. The Secretary ignores the fact, however, that the Second Circuit in *Ellis* and the Third Circuit in *Kuehner* held, in the early 1980s, that Social Security claimants could sue state DDS officials. A handful of other state DDS officials have been sued in federal district court in the intervening years. *See* Sec. Pet. 17 n.10. Nonetheless, we know of no state that has stopped administering the disability programs.

States have strong incentives to perform Social Security disability determinations. Administering the Social Security disability system gives the states thousands of jobs to fill, all of which go to their own residents. Furthermore, it is in the state's financial interest to see that all persons eligible for Social Security benefits receive them. Persons found ineligible for Social Security disability benefits often receive assistance under state-funded welfare programs. In Minnesota, the statute which authorizes the Department of Jobs and Training to perform disability determinations provides: "It is the purpose of this

relationship [with the Social Security Administration] to permit the citizens of this state to obtain all benefits available under federal law . . . ." Minn. Stat. § 268A.03(d).

The Secretary's second argument is no more persuasive. She argues that the Eighth Circuit's decision would frustrate Congress's goal of uniform administration of the Act. Again, the Eighth Circuit's decision has no impact on the question of uniformity. There is no greater risk to uniformity when a court orders a DDS official to comply with the Social Security Act and regulations than when a court orders the Secretary to comply. To the contrary, litigation against DDS officials is likely to promote uniformity among the different states and among the different decision-making levels.

3. The court of appeals here was reviewing the dismissal of respondents' claims against the state petitioners for lack of jurisdiction. The facts in the record, viewed in a light most favorable to the plaintiffs, clearly support the Eighth Circuit's decision. *See infra* Part II.A.4., pp. 15-16. The state action question is, however, a mixed question of law and fact to be determined at trial. *See, e.g., Albright v. Longview Police Dept.*, 884 F.2d 835, 838 and n. 1 (5th Cir. 1989); *International Society for Krishna Consciousness v. Air Canada*, 727 F.2d 253 (2d Cir. 1984) (interlocutory appeal dismissed as improvidently granted). The parties should be permitted to complete discovery and present evidence on the issue.

The disagreement between the Second and Eighth Circuits on the "color of law" issue may not in fact be irreconcilable. Since both courts reached their conclusions on appeal from a dismissal for lack of jurisdiction, neither court had the benefit of full development of the relevant facts. When presented with the same fully developed factual record, the two courts of appeals might agree that the state DDS officials do (or do not) act under color of state law. Thus, even if this Court considers the question of whether the state

petitioner acts under color of state law or exclusively under color of federal law to be of great importance, the Court should wait until after the final decision on the merits when the record will be fully developed. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916).

4. Finally, the petitions for a writ of certiorari should be denied because the decision below on the state action issue was clearly correct. Section 1983 applies to every person who acts "under color of any statute, ordinance, regulation, custom, or usage . . . ." 42 U.S.C. § 1983. The suggestion that state agency officials do not act under color of state law is counterintuitive. The State of Minnesota has, by statute, chosen to administer the Social Security disability programs at the initial and reconsideration levels. Minn. Stat. § 268A.03(d). The Secretary would not permit a private entity to perform the functions carried out by the DDS office; the alleged wrongful conduct by the state agency is possible only because it is a state agency, clothed with the authority of the state. 42 U.S.C. § 421(a); *U.S. v. Classic*, 313 U.S. 299, 326 (1941).

Petitioners' argument here that the state officials do not act under color of state law is analogous to arguing in *NCAA v. Tarkanian*, 488 U.S. 179 (1988), that the University of Nevada did not act under color of state law when it sanctioned Tarkanian in accordance with the NCAA's "recommendations." Despite the acknowledged power and influence of the NCAA, both the majority and the dissent agreed that the University officials had acted under color of state law. 488 U.S. at 183, 199. The state petitioners, like the University of Nevada, have agreed to comply with the regulations and guidelines of another entity. Like the University, the state petitioners retain several options. They can simply

cease making disability determinations as to some or all categories of disability claims. Alternatively, they can continue to administer the disability programs and work within the federal quality assurance program to alter federal policies with which it disagrees. The state petitioners, like the University, act under color of state law.

The state petitioners clearly carry the state's "badge of authority." *Tarkanian*, 488 U.S. at 191 (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). When DDS writes to a claimant to set up a consultative exam, to request additional information, or to get permission to obtain confidential information, it does so on official state agency stationery. C.A. App. 374. When DDS refers a claimant to a consultant it sends the consultant a state agency form advising the psychologist of the information needed. *Id.* at 372-73. DDS personnel are guided not only by the regulations and manual material issued by the Secretary, but also by a state agency manual, containing, for example, policies governing when a claimant should be referred to a consultant. C.A. App. 366. Petitioners have cited no decisions by this Court which support the startling proposition that state employees working in a state agency can be considered anything other than state actors. The decision of the Eighth Circuit permitting respondents to proceed with their claim against the state petitioners under section 1983 was correct.

B. The Court Should Not Issue a Writ of Certiorari to Decide Whether Congress Clearly Intended to Preclude a Remedy Under Section 1983.

The state and federal petitioners also argue an alternative ground for rejecting the court of appeals' decision that respondents have stated a claim under 42 U.S.C. §1983. Sec. Pet. at 18-19; State Pet. at 10-11. The petitioners argue that the Social Security Act establishes a remedial scheme which demonstrates Congress' intent to preclude a section 1983 remedy. On this issue, however, unlike the narrow question of whether the state

petitioner acts under color of state law, the petitioners cannot even allege a conflict among the circuits. Further, the Secretary does not assert that the Eighth Circuit's decision conflicts with any decisions of this Court.[9]

As a threshhold matter, the petitioners did not adequately preserve the question of whether Congress intended to foreclose a section 1983 action here. Both petitioners made this argument for the first time in their petitions for rehearing in the Eighth Circuit.[10] The Secretary argued that the comprehensive remedial schemes established by Congress foreclosed an action under section 1983. Secretary's Petition for Rehearing at 8 - 10. She relied, however, on *dictum* in *Suter v. Artist M.*, _ U.S. _, 112 S.Ct. 1360 (1992) and on *Schweiker v. Chilicky*, 487 U.S. 412 (1988), a case addressing whether a *Bivens* claim for damages could be brought under the Social Security Act; she failed even to cite *Smith v. Robinson*, 468 U.S. 992 (1984), or *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the cases upon which the Secretary now relies. The state officials, raising the same argument, cited a footnote in *Suter, supra*, and noted that the *Suter* court had in turn cited *Smith v. Robinson, supra* and *National Sea Clammers, supra*. State's Petition for Rehearing at 4.

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[9] The state petitioner, but significantly, not the Secretary, argues that the decision of the Court of Appeals "is inconsistent with this Court's decision in *Suter v. Artist M.*, _ U.S._, 112 S. Ct. 1360 (1992)." State Pet. at 10. In *Suter*, this Court found that Congress had not established a federal right enforceable by section 1983. The state's reliance on *Suter* is misplaced, since the Social Security Act clearly contains enforceable federal rights.

[10] In his opening brief, the Secretary had discussed the comprehensive scheme created by Congress to review individual disability decisions (42 U.S.C. § 405(g)), but only in connection with her argument opposing mandamus jurisdiction under 28 U.S.C. § 1361. As in the district court, the Secretary did not address the court's jurisdiction over the claims against the state agency at all.

Even if petitioners managed to preserve the argument by making it, however inadequately, in their petitions for rehearing, the Eighth Circuit did not address this issue. Furthermore, none of the other circuits has addressed the issue. This Court should not grant review to address an issue that has not been decided by a single circuit. *See Califano v. Yamaaski*, 442 U.S. 682, 702 (1979) (preferable to allow several circuits to pass on a claim to gain benefit of analysis of different courts).

Petitioners' arguments are, in any event, plainly wrong. This Court has repeatedly held that section 1983 should be broadly construed. *E.g., Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989). Consistent with this principle, the "burden to demonstrate that Congress has expressly withdrawn the [1983] remedy is on the defendant." *Id.* at 107; *see Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498, 520-21 (1990).

This burden is very difficult to meet. This Court has repeatedly cautioned that it will "not lightly conclude that Congress intended to preclude reliance on section 1983 as a remedy for the deprivation of a federally secured right." *Wilder*, 496 U.S. at 520; *Golden State Transit*, 493 U.S. at 107; *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423-24 (1987); *see also Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Absent an express statutory provision precluding section 1983 enforcement, the Court has "found private enforcement foreclosed only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" *Wilder*, 496 U.S. at 521 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)). Petitioners cannot meet their burden by showing that the statute includes a remedial mechanism different from enforcement under § 1983; rather, "the statutory framework must be such that '[a]llowing

plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.'" *Golden State Transit*, 493 U.S. at 107 (quoting *Smith*, 468 U.S. at 1012 (emphasis added)). The statute must "leav[e] no room for additional private remedies." *Suter v. Artist M.*, _ U.S. _, 112 S. Ct. at 1368 n.11 (1992).[11]

The petitioners point to two separate administrative schemes in an effort to show that Congress intended to foreclose a section 1983 action against the state agency. First, they point out that the Secretary maintains performance standards for the state agencies and may take over the task of making initial and reconsideration decisions if the state agency substantially fails to comply with the Secretary's policies. Sec. Pet. at 19; State Pet. at 11. Second, they rely on the administrative review process under section 405(g) whereby a claimant can appeal the denial of a claim for benefits. These administrative schemes fail to establish Congress's intent to foreclose a section 1983 action against the state agency under the circumstances presented here.

The ability of the Secretary to take action against a state DDS office when the Secretary deems it appropriate is of little comfort to respondents. Social Security claimants cannot trigger any action by the Secretary under this remedial scheme. In fact, there is not even a mechanism for claimants to participate in the Secretary's review of a state agency's practices. *Cf. Wright*, 479 U.S. at 426; *Rosado v. Wyman*, 397 U.S. 397, 406 n.8 (1970). Furthermore, although the Secretary is required to review 50 percent of DDS decisions which are favorable to claimants, there is no parallel requirement to review unfavorable

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[11]Applying these principles, this Court has found that a comprehensive remedial scheme is sufficient to demonstrate Congressional intent to foreclose a section 1983 action on only two occasions. *See Smith v. Robinson*, 468 U.S. 992 (1984); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

decisions, like those at issue here.[12] Finally, to the best of our knowledge, the Secretary has never exercised the statutory authority to take over the responsibilities of a DDS office. Clearly, this does not approach the kinds of comprehensive remedial schemes found to evidence Congress's intent to foreclose a section 1983 action in *Smith* and *Sea Clammers*.

Nor does a claimant's ability to appeal the denial of a claim for benefits evidence Congress's intent to foreclose a section 1983 action which seeks to challenge the procedures used by a state DDS agency at the initial and reconsideration levels only. At the ALJ level, an appeal under 42 U.S.C. § 405(g) determines one thing and one thing only - whether the claimant is eligible for benefits. The appeal from the state agency decision is *de novo*; the state agency is not a party; the sole issue is eligibility for benefits. An administrative appeal under section 405(g) simply does not encompass a claim that the state DDS agency has systematically violated federal law or the Constitution.

Section 405(g) enables a claimant to bring an action against the Secretary in district court to challenge an unfavorable final decision made after a hearing; it does not on its face authorize an action against the state agency. Even if the state agency were a proper defendant under section 405(g), which petitioners do not concede, a claimant who has received a decision following a hearing would be unable to challenge the procedures used by the state agency only at the initial and reconsideration levels. If the claimant were denied benefits at the ALJ level, he could no longer claim that DDS policies are the proximate cause of his injury. If the claimant were awarded benefits at the ALJ level and nonetheless files a complaint under section 405(g), the government would surely seek dismissal for lack

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[12]Respondents attempted to find out what percentage of DDS denials and terminations are reviewed by the Secretary, but the deposition witness did not know. Klemann deposition, Vol. II at 252. This question, like many others, awaits further discovery.

of standing. *Cf. Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (there would be "grave doubt" whether the Secretary could appeal adverse district court judgment after award of benefits by ALJ on remand). In short, a remedial scheme which fails to provide any remedy at all against the state actor cannot possibly be considered sufficiently comprehensive to evidence Congress's intent to foreclose a section 1983 action. *Cf. Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 522-23 (1990).[13]

III. The Petition Should Be Denied as to the Section 405(h) Question.

The state petitioners ask this Court to grant their petition for certiorari with respect to whether they are protected from suit by 42 U.S.C. § 405(h)]. State Pet. at i, 13-14.[14] Section 405(h) precludes certain actions against "the United States, the Secretary, or any officer or employee thereof." The Eighth Circuit, relying on the plain language of the statute, concluded that section 405(h) did not apply to the state DDS officials. Sec. Pet. App. 16a-17a.

Petitioners do not claim that there is any split among the circuits as to this question, or that the question is an important one. Their sole argument is that the Eighth Circuit's decision produces a result not intended by Congress. State Pet. at 13. There is simply no basis for granting review as to this question.

The state petitioners concede that the Eighth Circuit's reading of section 405(h) was "literally correct." *Id.* The only way section 405(h) can be read to apply to

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[13]In contrast, the administrative scheme under 405(g) would indicate Congress' intent to foreclose a section 1983 action by a Social Security claimant seeking only reversal of the denial of his claim for benefits. *See supra* p. 13.

[14]The Secretary does not state this issue as a separate 'Question,' but does argue that section 405(h) precludes a section 1983 claim against the state DDS officials. Sec. Pet. at 20.

actions against state agency officials is if they are considered to be "the Secretary" as used in the statute. If state DDS officials are considered to be "the Secretary" for purposes of section 405(h), then surely they are also "the Secretary" for purposes of section 405(g), which creates a cause of action against the Secretary. To argue, as petitioners do, that section 405(h) precludes respondents' claims against the state officials without admitting that section 405(g) would permit these claims makes no sense. For the reasons set forth in Part II.A.2., *supra* pp. 11-14, whether respondents can proceed against the state petitioners under section 1983 or only under section 405(g) is of little importance to petitioners or respondents.

IV. The Petition Should be Denied as to Waiver of Exhaustion of Administrative Remedies Under Section 405(g).

Even if this Court grants the state's petition for a writ of certiorari, and grants the Secretary's petition for certiorari with respect to the first question presented, the Court should deny review of the second question she presents, namely whether the Court of Appeals properly relied on *Bowen v. City of New York*, 476 U.S. 467 (1986), to waive section 405(g)'s exhaustion requirement. *See* Sec. Pet. at i.

As an initial matter, the Secretary has not challenged the Eighth Circuit's conclusion that the district court had mandamus jurisdiction to consider respondents' claims. The existence of an alternative basis of jurisdiction renders the section 405(g) question unimportant.[15]

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[15]The Secretary misreads the Eighth Circuit's decision, asserting that the court of appeals "found it unnecessary to decide whether relief was also available under the mandamus statute . . . ." Sec. Pet. at 13 n. 7. In fact, although the court found it unnecessary to discuss mandamus jurisdiction, the court held that mandamus jurisdiction was available, vacated the district court's order dismissing mandamus jurisdiction, and specifically directed the district court to consider the propriety of a mandamus order, relying on its decision in *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 971 n.17 (8th Cir. 1983). Sec. App. 15a.

Even if mandamus jurisdiction were not available, this Court should deny review of the section 405(g) question. There has been no disagreement among the circuits about the scope of *City of New York*.[16] The courts of appeals have uniformly rejected the Secretary's efforts to rewrite the *City of New York* decision to limit class action challenges to the administration of the Social Security disability programs.[17] The Secretary is trying to relitigate the issues fully settled by *City of New York* only seven years ago in an attempt to insulate entire levels of agency decision-making from judicial review.

Furthermore, there has not been a proliferation of class actions against the Secretary. In fiscal year 1991, there were nearly two million initial determinations on disability claims. During the same time period, there were 4,869 federal district court decisions on disability claims. 1992 Green Book at 61. A Westlaw search identified only ten district court decisions in fiscal year 1991 in class actions filed under 42 U.S.C. § 405(g).[18] Clearly, Social Security claimants themselves as well as the courts have followed the

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[16]*Grant v. Shalala*, No. 91-5675 (3d Cir. March 5, 1993), decided after the petitions' for certiorari were filed here, is not to the contrary. In *Grant*, a class of Social Security claimants challenged the impartiality of one particular ALJ. The Third Circuit distinguished *City of New York* and other cases which challenge a practice or policy of the Social Security Administration. Slip. op. at 25, 28 n.15.

[17]In addition to the cases cited by the Solicitor General from the Third, Fourth, Seventh, Ninth and District of Columbia Circuits, see Sec. Pet at 27 n. 19, the Second and Eighth circuits have rejected his arguments. *See New York v. Sullivan*, 906 F.2d 910 (2d Cir. 1990); *Polaski v. Heckler*, 751 F.2d 943 (8th Cir. 1984), *remanded* 476 U.S. 1167 (1986), *on remand*, 804 F.2d 456 (8th Cir. 1986), *cert. denied*, 482 U.S 927 (1987).

[18]Social Security claimants have prevailed on the merits of most if not all of the class actions in which exhaustion has been waived. Were it not for waiver of exhaustion, the Secretary would have been permitted to violate the mandates of the Social Security Act with virtual immunity, to the detriment of thousands of disabled children and adults. *See, e.g., Sullivan v. Zebley*, 493 U.S. 521 (1990).

admonition from this Court in *City of New York* that "exhaustion is the rule in the vast majority of cases." *See* 476 U.S. at 486.

The Secretary's efforts to distinguish this case from *City of New York* are plainly erroneous. She argues that exhaustion should not have been waived in this case because respondents have not established the existence of a clandestine policy. The claimants in *City of New York*, after a seven-day trial, proved the existence of a clandestine policy. This Court relied on the existence of a clandestine policy solely to toll the limitations period for class members whose administrative claims had lapsed before the class action complaint was filed. *City of New York*, 476 U.S. at 480-82. Respondents here moved for certification of a class whose members all had live claims at the time they filed their complaint. C.A. App. 126-27. Neither this Court nor any court of appeals has held that a clandestine policy is necessary or even relevant to the decision to waive exhaustion of administrative remedies for claimants with live claims.[19] *See* 476 U.S. at 482-486.

The *City of New York* decision relied heavily on *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which this Court first discussed judicial waiver of exhaustion of administrative remedies under section 405(g). In *Eldridge*, the plaintiff had challenged the failure of the Secretary to provide pretermination hearings. Although there was nothing secretive about the Secretary's regulations governing the appeal process, this Court nevertheless concluded that it was proper to waive the exhaustion requirement. The *City of New York* decision adopted the *Eldridge* analysis, cautioning that the *Eldridge* factors should not be applied mechanically. *City of New York*, 467 U.S. at 484. There is no support for the Secretary's

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[19] *See Marcus v. Sullivan*, 926 F.2d 604, 614-15 (7th Cir. 1991); *Bailey v. Sullivan*, 885 F.2d 52, 65 (3d Cir. 1989); *Hyatt v. Heckler*, 807 F.2d 376, 379-80 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).

argument that, in *City of New York*, this Court established an additional requirement, allowing waiver of exhaustion only when claimants challenge a secretive policy.

The Secretary's attempt to distinguish this case from *City of New York* with respect to the futility of exhaustion is also seriously flawed. Exhaustion would be futile here for precisely the same reasons it was futile in *City of New York*. The policies which the claimants challenged in *City of New York*, just like the policies challenged here, were applied only at the initial and reconsideration level.[20] *See City of New York v. Heckler*, 578 F. Supp. 1109, 1115-16 (E.D. N.Y. 1984). Here, as in *City of New York*, the "errors" which respondents seek to correct are the practices and procedures employed by the state agency officials in the cases of all class members, regardless of the facts presented by any particular claimant. An appeal by an individual claimant to an ALJ may result in the award of benefits, but it never removes or corrects the systemic errors that respondents challenge.

The Secretary argues that exhaustion would not be futile here because a claimant who pursues his administrative remedies will eventually be evaluated properly by an ALJ, and may be awarded benefits. The question, however, is not whether a claimant will eventually be evaluated properly and awarded benefits; the question is whether there is any realistic possibility that the Secretary would alter an established policy at the behest of a single claimant in an individual appeal. *See Eldridge*, 424 U.S. at 330. Under the procedures challenged in *Eldridge*, Social Security claimants who exhausted their administrative procedures eventually obtained adequate due process hearings. This Court approved

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[20]Indeed, in its brief to this Court in *City of New York*, the Secretary emphasized that: "The internal SSA memoranda reflecting the interpretation of the regulations that respondents challenged concededly were not binding upon the ALJs or the Appeals Council." C.A. Supp. App. at 13.

the waiver of exhaustion, however, where "denying Eldridge's substantive claim 'for other reasons' or upholding it 'under other provisions' at the post-termination stage . . . would not answer his constitutional challenge." 424 U.S. at 331-32 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975)).

As in *Eldridge* and *City of New York*, denying or upholding respondents' claims for benefits at the ALJ stage does not answer their claim that the practices and procedures employed at the initial and reconsideration levels are illegal. Most disability claimants lack the personal resources to pursue an appeal to the hearing stage.[21] Yet all claimants, as Congress has mandated, are entitled to uniform standards throughout the administrative process. 42 U.S.C. § 421(k)(1). If exhaustion is not waived, "SSA could operate indefinitely . . . with two standards . . ., one for claimants who seek review . . ., and one for claimants who do not." *Jones v. Califano*, 576 F.2d 12, 19 (2d Cir. 1978). As this Court stated in *City of New York*: "We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place." 476 U.S. at 484.

The Secretary's discussion of the irreparable harm requirement similarly finds no support in any court decision. She suggests that only where going through the administrative appeal process could cause a 'severe medical setback,' as in *City of New York*, should exhaustion be waived. Sec. Pet. at 24-25. Although there were allegations that the plaintiffs in *City of New York* would suffer severe medical setbacks if they were required to exhaust their administrative remedies, this is not the only kind of irreparable harm that

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[21]Only one third of the disability claimants whose applications are denied appeal to the ALJ level. 1992 Green Book at 61.

justifies waiver. In *Eldridge*, 424 U.S. at 331, for example, this Court approved waiver of exhaustion where the claimant "has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." And in *Schweiker v. Chilicky*, 487 U.S. 412, 428 (1988), this Court recognized that "months of delay in receiving [Social Security] income on which one has depended for the very necessities of life cannot be fully remedied by the 'belated restoration of back benefits.'" The record in this case is replete with uncontradicted evidence of the ways in which the many months of delay causes class members to suffer not only economic loss, but also irreparable physical and emotional harm. (C.A. App. 128-248.)

Finally, with respect to the collateral nature of the relief sought, the Secretary does not even pretend that the Eighth Circuit's decision was inconsistent with *City of New York*. Rather, she ignores the controlling decision and asserts that "the standard for determining whether a claim is 'collateral' for purposes of dispensing with Section 405(g)'s exhaustion requirement should . . . approximate the stringent standard developed for the 'collateral order' doctrine of appellate review enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)." Sec. Pet. at 26.

No court has ever applied the collateral order doctrine of *Cohen* to the waiver of exhaustion analysis. In fact, in *City of New York*, the lower court had recognized that the plaintiffs' claims were not wholly collateral to their claims for benefits, but rather the two were "somewhat intertwined". *City of New York v. Heckler*, 742 F.2d 729, 736-37 (2d Cir. 1984). Nonetheless, this Court affirmed the lower court's decision that the plaintiffs' claims were sufficiently collateral to support waiver of exhaustion. The Secretary is actually urging

this Court to substantially alter if not overrule its decision in *City of New York*. If the Secretary's arguments on collaterality were adopted, waiver of exhaustion of administrative remedies would be foreclosed in virtually every case challenging the standards used to determine disability claims.

There is absolutely no basis for this Court to issue a writ of certiorari to review the section 405(g) question raised by the Secretary.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Dated this 14th day of July, 1993.

Respectfully submitted,

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ORIGINAL

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Nos. 92-1392 and 92-1395

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

WALTER ROERS, in his official capacity as Director of the Disability Determination Services; R. JANE BROWN, in her official capacity as Commissioner of the Minnesota Department of Jobs and Training, PETITIONERS,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CERTIFICATE OF SERVICE

I, Laurie N. Davison, a member of the Bar of this Court, hereby certify that on this 14th day of July, 1993, one copy of a Motion for Leave to Proceed in forma pauperis, Declarations of Daniel J. Schoolcraft, Joseph L. Drumbeater and Kathleen M. Davis, and

Respondents' Brief in Opposition in the above-entitled case were mailed, first class postage prepaid, to:

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I further certify that all parties required to be served have been served.

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Re: ***Shalala v. Schoolcraft; Roers v. Schoolcraft***
Nos. 92-1392; 92-1395

Dear Mr. Suter:

Enclosed please find a Motion for Leave to Proceed In Forma Pauperis, Declaration of Daniel J. Schoolcraft, Joseph L. Drumbeater and Kathleen M. Davis, the original and twelve copies of Respondents' Brief in Opposition, and a Certificate of Service.

Very truly yours,

LEGAL AID SOCIETY OF MINNEAPOLIS

L N. D

Laurie N. Davison
Litigation Director

LND:bbo

Enclosures

United Way Agency